S. HRG. 100-374

CIVIL RIGHTS RESTORATION ACT OF 1987

HEARINGS

BEFORE THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 557

TO RESTORE THE BROAD SCOPE OF COVERAGE AND TO CLARIFY THE APPLICATION OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

MARCH 19 AND APRIL 1, 1987

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CIVIL RIGHTS RESTORATION ACT OF 1987

THURSDAY, MARCH 19, 1987

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee convened, pursuant to notice, at 10:06 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy, (chairman) presiding.

Present: Senators Kennedy, Hatch, Stafford, Thurmond, Metzenbaum, Weicker, Adams, Humphrey, Simon, Harkin, and Mikulski.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The committee will come to order.

We begin hearings today on the unfinished agenda of civil rights. The Civil Rights Restoration Act is one of the most important civil rights bills of this decade. The Supreme Court's unfortunate decision in the *Grove City College* case in 1984 seriously undermines four major civil rights statutes that prohibit discrimination in federally assisted programs.

In my view, the Court misconstrued the intent of Congress. We tried to correct the error immediately in 1984, but our efforts were blocked by six opponents on the floor of the Senate, opponents of this Civil Rights Restoration Act. Now the Senate is under new management and we intend to try again.

As we begin the 100th Congress, the 200th anniversary year of the Constitution, it is fitting that we should seek to reaffirm the strong bipartisan support for civil rights. In the two centuries since the Constitution was signed, we have made great strides towards the goals of liberty and opportunity embraced by the framers.

But it is a sad reality that discrimination still is too much a part of American life in this bicentennial year. We ought to be moving forward on civil rights, instead of acquiesing in retreats as we have done for the past two years on the *Grove City* issue.

The Supreme Court's decision has been a clear setback in our efforts to end discrimination in the use of Federal funds. The Department of Education's Office of Civil Rights has dropped or limited 79 cases involving all levels of education because of the ruling. Enforcement actions involving race, age, and handicap discrimination have been impeded by the decision. The *Grove City* decision has left those with disabilities in our society without recourse when discrimination denies them their livelihood.

In addition to the cases closed, compliance review by Federal agencies have dropped sharply. Such reviews are a key enforcement tool and their effectiveness has been severely eroded when cases have been delayed or suspended because of the Court's decision. Individuals who have been unfairly denied equal access to education and health care and employment are forced to wait months and years to have their claims heard. Decisions by Federal agencies charged with enforcement of civil rights laws are hampered by defendants and potential defendants who assert that the *Grove City* decision prohibits even investigation of civil rights complaints.

We cannot permit these gaps in the protections afforded by our civil rights laws to remain unfilled. The Kennedy-Weicker bill is designed to restore the original coverage of these four basic civil rights laws so that they can become effective tools again in the battle against discrimination.

The key provisions of the bill define the phrase program, or activity, and restate the broad institution-wide coverage intended by Congress when it passed the four laws. The Supreme Court's decision gave an excessively narrow interpretation to the phase and our legislation will restore the original broad interpretation.

The witnesses this morning will discuss the need for this legislation. In order to expedite the action by Congress, the bill includes no changes in these statutes to strengthen civil rights. The bill is a restoration act and that is all it is designed to do. Proponents of civil rights will attempt to derail this bill, as they have in the past, by raising irrelevant, divisive issues. The test should be simple: If the proposed amendment would change the law from what it was prior to *Grove City,* we should vigorously oppose it. Those battles can await another bill on another day.

The challenge we address here is to enact a law to stop the shameful back-sliding on civil rights. President Kennedy transmitted the first of these statutes to the Congress, and he said: "simple justice requires that public funds to which all taxpayers of all races contribute not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

The basic principle is clear: The Federal Government should not permit tax dollars to be used in any way that subsidizes discrimination. That premise is as valid today as it was a quarter of a century ago and Congress should lose no time in righting this wrong to civil rights.

Finally, with all respect, I urge the Supreme Court to reassess the standard it uses to construe the intent of Congress. Many times during the course of this debate, I have reviewed the legislative history of the statutes involved in the *Grove City* case and I continue to feel that the Court's decision is strained, to say the very least.

It is not enough in my view, especially on an issue as critical as civil rights, for the courts to deal cavalierly with Congress, to tell us to try again and this time to state our will more clearly. Proper comity between the courts and Congress requires mutual respect, more mutual respect than that.

Sometimes our statutes are poorly drafted and court intent is far from clear. In such cases, there is ample justification for the Supreme Court to ask Congress to pass a law again. That is not this case. We know that the enemies of civil rights will resort to any pretext to escape their obligations. Any lawyer worth his salt or her salt can throw sand in the legislative history and create doubt where none exists.

Perhaps we did not draft the anti-discrimination statute clearly enough to pass a reasonable doubt test, but that standard of statutory construction is far too strict and I regret that the Supreme Court chose to apply it in this case.

We will insert Senator Simon's opening statement in the record at his point.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. I am pleased to join my colleague, Senator Kennedy, and the other members of the Committee on Labor and Human Resources as we begin this first in a series of hearings on the Civil Rights Restoration Act. In my view, the committee has no higher legislative priority in the 100th Congress than to overturn the decision in *Grove City College* v. *Bell.* Since the 98th Congress, when I was successful in shepherding through the House the original bill, neither body has successfully moved this legislation. That fact alone represents a black mark on the civil rights record of the Congress of the United States.

I hope that this committee will listen carefully to all witnesses, then take the practical and necessary step of restoring the broad civil rights protections, which existed under title IX of the education amendments of 1972, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 prior to the decision in *Grove City College.*

Compromise may be necessary—but capitulation on the basic principles must be rejected. I stand ready to work with all of my colleagues on the committee to assure that this legislation is enacted this year.

The CHAIRMAN. Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

Mr. Chairman, S. 557, the Civil Rights Restoration Act of 1987, is intended to reverse the Supreme Court's holding in *Grove City* v. *Bell,* a 1984 case. There the Court held that Congress intends the statutory phrase "program or activity" to mean just that, a program or activity and not an institution, consequently, the non-discrimination requirements of title IX of the Education Amendment of 1972 cover only the specific program or activity which is the recipient of Federal financing assistance.

A majority in Congress, including myself, believe that there are sound public policy reasons for overturning this decision. I reemphasize that: A majority in Congress, including me, believe that there are some public policy reasons for overturning this decision and making sure that title IX is applied to an institution or on an institution-wide basis.

I have been willing since the fall of 1984 to overturn the *Grove City* decision. Senator Dole and I sponsored legislation in the 99th Congress that would have accomplished this result. That bill would not only have overturned *Grove City* in that decision but also provided institution-wide coverage for educational institutions under three other civil rights statutes: title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Unfortunately, nothing happened on this bill because we were unable to resolve the controversy over the scope of Federal regulatory jurisdiction. The real issue before us is not, nor has it ever been, a question of commitment to title IX and the other Federal civil rights statutes. On that point we agree.

The issue is not stamping out discrimination. On that point we agree. The real issue is whether we believe that there is a limit to the power of the Federal Government to dictate policy for small businesses, private organizations, businesses, and State and local governments, including religious institutions and, I might add, nonprofit corporations, in other words everybody in society.

If we want the Federal Government tentacles into everybody's pockets around society, then pass this bill the way it is written. It is disguised as the new civil rights law, which it is not, because we agree on those aspects of it.

I for one believe that there should be a limit of such Federal Government power and great care has to be extended when we propose legislation that would infringe on the traditional distinctions between public and private sectors, between Federal and State Governments, between Federal and local governments. This is really important stuff. This is not some insignificant bill, nor is it all one side for civil rights and all against civil rights on the other. Nobody on the other side is against civil rights or against any of these three statutes or against over turning title IX.

So I personally tend to resent it when people indicate that that is what it is. In the past, it has been readily apparent that if you understood the full implications of previous versions of S. 557, for example, there was a common understanding as to who would be covered by the proposals of whether the legislation would interfere with one of our most fundamental rights, the right to practice free and fully one's religious beliefs. It was never clear whether a rancher receiving water from a Federal water project was covered or just what was the status of a farmer getting crop subsidies. There was no consensus of whether coverage extended to a recovery receiving food stamps or a small business receiving technical advice from a State economic development agency which in turn had received some Federal dollars.

Now, I found this confusion about this bill somewhat ironic, since it was confusion over legislative language that resulted in the *Grove City* decision to begin with. Concerns over how these proposals could be interpreted were raised by a variety of groups, ranging from the U.S. Catholic Conference to Agadith Israel of America to the U.S. Chamber of Commerce to virtually most every businesses in America, to virtually every nonprofit corporation and many, many religious institutions. Their testimony during earlier hearings stands as a sharp reminder of the dangers that can be posed to fundamental liberties and constitutional principles by oversimplistic and unclear legislation, and as it is currently drafted this is unclear legislation.

Mr. Chairman, I look forward to these hearings, to the answers to questions that I know several of my colleagues will ask with regard to this bill. I am committed to enforcing title IX, to overturning the *Grove City* decision, and to making sure that our civil rights laws are effective, but I am also committed to achieving these goals in a manner which avoids trammeling other equally important rights and liberties guaranteed by our Constitution. I am not willing to let the Federal Government become the total power over everybody, over everything, over every small business, over every religious institution, over everything else under the guise of civil rights in this country when that is not even the issue.

Discrimination is not the issue. We all want to stand for that. Overruling title IX is not the issue. We all want to have it apply institution-wide. And I might add that it is time that we all start realizing the real constitutional and important issues involved in this matter.

To overturn the *Grove City* decision, we need not make the Federal Government omnipresent in everybody's life, but if we pass this bill, take it from me, it is going to be omnipresent in everybody's life in ways that you have never dreamed possible in the past, and that is why this bill has not been instantaneously passed. We are willing to do what I said we would do, and that is overturn *Grove City,* make it institution-wide and apply the other three statutes as well to institutions of higher education.

Mr. Chairman, Senator Thurmond has indicated he has to leave and he needs about two or three minutes and I would like to give the balance——

The CHAIRMAN. We want to accommodate the Senator, but how long does the Senator intend to talk?

Senator HATCH. I would be happy to give him——

Senator THURMOND. Well, I believe I am next, if the distinguished Senator——

The CHAIRMAN. Well, we go back to the Senator from Ohio. We rotate—I would be glad to accommodate for a couple of minutes——

Senator THURMOND. Three and a half minutes.

The CHAIRMAN. If the Senator from Ohio would be glad to yield, the Senator from South Carolina.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I want to say in the beginning I highly disagree with you and your interpretation. I do agree with the ranking member, Senator Hatch, and his interpretation.

It is a pleasure to be here today as the Committee on Labor and Human Resources begins hearings on S. 557, the proposed Civil Rights Restoration Act of 1987. There is no doubt that a majority of our colleagues in the Senate and in the House favor further review of the 1984 Supreme Court decision in *Grove City* v. *Bell*. S. 557 is the latest of a number of bills that have been considered since the *Grove City* decision which have proposed to alter the effect of the decision.

Despite broad agreement on the need to revisit the issues addressed in the *Grove City* case, the legislative proposals related to the decision have been controversial. As I have said before, I believe this controversy has been improperly focused. The question is not whether or not Federal financial assistance should be allowed to fund discriminatory activities. Indeed, I believe that Americans support continued prohibition of such use of Federal funds.

The true controversy underlying this legislation is based upon far more complex, yet subtle questions which arise in the implementation of this accepted policy goal. It is here that a number of significant questions must be raised and clearly answered during the process we begin today.

For example, what breadth of coverage should be invoked as a result of receipt of Federal funds by a particular entity and is this breadth clearly defined in the legislative language? What should or should not qualify as Federal financial assistance? In other words, how far will the Federal dollar or the benefits of the Federal dollar be traced to invoke coverage under the statutes addressed in S. 557? Is the language of S. 557 clear on this point?

Mr. Chairman, we find ourselves considering this matter today in part because the current laws which prohibit the use of Federal funds to support discrimination are not explicit in answering the foregoing and other important questions. I state this, despite some strong beliefs of my own as to what was intended by Congress in enacting the standing laws. If Congress is to revise title IX or other antidiscrimination statutes, it should do so responsibly, by leaving as little to agency and judicial interpretation as possible.

I look forward to reading the testimony we will receive on this issue today. I have a vital meeting in the Strategic Subcommittee of the Armed Services Committee and am compelled to go there now.

Thank you, Mr. Chairman, and I wish to thank the able Senator from Ohio for his consideration.

The CHAIRMAN. We thank the Senator from South Carolina. I appreciate his differing with me and my position on it. I think hopefully the position that we have taken is the position that is going to be supported by the American people and that is that we are not going to permit the use of American tax-payers to perpetuate and enhance discrimination. That is the issue.

The Senator from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Today's hearing begins the final chapter, hopefully, of an overdue process to restore this nation's civil rights laws. Because of an erroneous Supreme Court decision in 1984, millions of Americans, women, racial minorities, older persons, and the disabled have been deprived of basic civil rights protections.

In the 3 years since the *Grove City* decision, nothing has been done to correct the problem. This congressional in action is a disgrace. It is particularly shameful because civil rights protection for millions of Americans has been held hostage by a campaign of obfuscation and misinformation.

The Civil Rights Restoration Act of 1987 presents a simple issue: Are we going to return the law to its status before the *Grove City* decision, or are we going to permit institutions receiving Federal funds to continue to discriminate. The issue is not abortion, the issue is not religion, the issue is not the impact on business. The issue is whether or not we will continue to allow the Federal Government to underwrite discriminatory programs.

It is impossible to compartmentalize discrimination. If one part of an institution discriminates, then the entire institution is tainted by that discrimination. Whether it be sex discrimination in educational institutions or discrimination against racial minorities, the aged or the handicapped, Federal funds cannot and should not be used to subsidize institutions that violate basic civil rights.

I look forward to hearing the witnesses today and I am confident that this Congress finally will pass the Civil Rights Restoration Act. We have spent the last 6 years turning the clock back on civil rights while this administration failed to administer the laws of this country, and in that interim period the Supreme Court decision helped to turn that clock back. I think it is high time that we moved the clock forward dramatically, strongly, and without any reservations, and I believe that when we pass this bill we will have sent a signal to the Nation that we are again on the march towards equal rights for everyone in this country.

Thank you.

The CHAIRMAN. Thank you.

The Senator from Vermont, Senator Stafford.

OPENING STATEMENT OF SENATOR STAFFORD

Senator STAFFORD. Thank you, Mr. Chairman. Since I am an original cosponsor of this legislation on which we are having a hearing this morning with you and Senator Weicker, it means in Vermont this will be known as the Stafford-Kennedy-Weicker bill. [Laughter.]

Since many good statements have already been made and there are a large number of witnesses, I am going to ask unanimous consent that the balance of my statement may appear in the record.

[The prepared statement of Senator Stafford follows:]

March 19, 1987

STATEMENT BY SENATOR ROBERT T. STAFFORD BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

TODAY THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE TURNS TO THE CONSIDERATION OF S.577, THE CIVIL RIGHTS RESTORATION ACT, A BILL OF WHICH I AM PLEASED TO BE AN ORIGINAL COSPONSOR. SENATOR KENNEDY AND SENATOR WEICKER ARE TO BE COMMENDED FOR THEIR TIRELESS EFFORTS TO PROTECT THE CIVIL RIGHTS OF ALL AMERICANS, AND THE LEADERSHIP THEY HAVE SHOWN IN THIS AREA.

THE CONGRESS HAS DEBATED THIS IMPORTANT LEGISLATION ON A NUMBER OF OCCASIONS IN THE LAST THREE YEARS, AND IN THIS SENATOR'S OPINION, IT IS TIME TO ACT TO CORRECT THE PROBLEMS CREATED BY THE SUPREME COURT'S DECISION IN GROVE CITY V. BELL.

OF PARTICULAR CONCERN TO ME IS THAT TWO SECTIONS OF THE LAW WHICH I HELPED TO AUTHOR, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND SECTION 504 OF THE REHABILITATION ACT OF 1973, BE ENFORCED PROPERLY. THESE PROVISIONS WERE ENACTED BY THE CONGRESS

TO END DISCRIMINATION AGAINST WOMEN AND DISABLED PEOPLE. BEFORE THE GROVE CITY RULING, TITLE IX AND SECTION 504 WERE JUST BEGINNING TO WORK WELL ACROSS THE NATION. WE NEED TO MAKE SURE THAT IN THE FUTURE, WOMEN AND GIRLS HAVE ACCESS TO A QUALITY EDUCATION AT THE ELEMENTARY, SECONDARY AND POSTSECONDARY LEVELS. FURTHERMORE, WE NEED TO REAFFIRM ONCE AGAIN THE PROTECTION THAT SECTION 504 HAS OFFERED TO HANDICAPPED INDIVIDUALS.

MR. CHAIRMAN, I COMMEND YOU FOR HOLDING THIS HEARING THIS MORNING, AND I LOOK FORWARD TO WORKING WITH YOU AND SENATOR WEICKER IN PASSING THIS LEGISLATION AS SOON AS POSSIBLE.

The CHAIRMAN. Thank you very much. The Senator from Vermont has been a consistent supporter of the position to overturn the decision of the Supreme Court.

The Senator from Washington, Senator Adams.

OPENING STATEMENT OF SENATOR ADAMS

Senator ADAMS. Thank you, Mr. Chairman.

I would like to take this opportunity to express my deep concern about the Supreme Court's decision in the case of *Grove City College* v. *Bell* and its impact on the rights of women, minorities, disabled persons and the elderly.

In 1964, when this act was passed, it signalled that the time had come for the Nation to put a halt to discrimination in all forms and I certainly agree with the chairman's statement that the issue really here is should Federal tax dollars be used and allowed to be used to establish and continue a system of discrimination in the United States. That is wrong and we should change that.

The passage of the act in 1964 was a signal that the Federal Government would assume its rightful role in the fight for equality by insuring that programs that receive Federal funds did not discriminate against people based on race, religion, color or national origin. The fight for equality did not end in 1964. It was the beginning.

It soon became apparent to those of us in Congress—and I was in Congress at that time—that discrimination in this Nation was not limited to people of color but extended to other segments of our society, to women, the handicapped, and to the elderly. Recognizing the repugnancy of discrimination, Congress took action and title IX of the 1972 Education Amendments was enacted to protect the rights of women in educational programs and activities receiving Federal assistance.

Section 504 of the 1973 Rehabilitation Act was enacted to prohibit recipients of Federal funds from discriminating against disabled persons, and in 1975 Congress passed the Age Discrimination Act, prohibiting discrimination on the basis of age and the delivery of services and benefits supported by Federal funds.

I was in Congress during these years, Mr. Chairman. I supported those programs then and I support them now, and the decision of the U.S. Supreme Court in the case of *Grove City* v. *Bell* in my opinion is based on a clear misunderstanding of the intent of Congress in enacting title IX of the 1972 Education Amendments.

The decision stands for the proposition that government funds may be used to subsidize an institution which fosters and promotes discrimination. As one who served in the House when this measure was enacted, I can say flatly that it was the intent of Congress to prohibit the granting of Federal funds to institutions which practice discrimination in any form.

I understand and respect the unique role the Supreme Court plays in interpreting the laws of this land, and I believe that Congress in most cases should act with the utmost caution when overturning decisions arrived at in good faith with careful deliberation.

However, in the *Grove City* case we are not involved with interpretation of the Constitution but, rather, the interpretation of an Act of Congress. Congress has the prerogative not only to legislate, but to insure that its legislative intent is realized. The *Grove City* decision clearly thwarts the will of Congress and acts as a barrier to the realization of our dream of equality for all.

I believe it is incumbent on the Congress to pass the Civil Rights Restoration Act, preventing further erosion of the rights of women, minorities, the disabled and the elderly.

Those of us who fought for civil rights in the 1960's know that retreat is synonymous with defeat. We did not accept defeat in the sixties and we cannot accept retreat, Mr. Chairman, in the 1980's.

I thank you for the time.

The CHAIRMAN. We welcome the opportunity to introduce this legislation with the Senator from Connecticut, where the legislation is known as the Weicker-Stafford-Kennedy bill. [Laughter.]

The Senator from Connecticut, Senator Weicker.

OPENING STATEMENT OF SENATOR WEICKER

Senator WEICKER. Thank you very much, Senator Kennedy and Senator Stafford.

I want to commend first of all the chairman of the committee for moving so expeditiously to hold hearings on the Civil Rights Restoration Act, the most important civil rights legislation that Congress will consider. I just want to say as a Republican how aggrieved I am that this was not done when we were in the majority, both on this committee and on the floor of the U.S. Senate.

When these 2 days of hearings are concluded, however, I am certain it will be clear to all that the case for swift passage of the legislation is an overwhelming one. No longer can we afford to tolerate discrimination against anyone, whether it be women, minorities, the disabled or the elderly in any federally assisted program.

In the *Grove City College* decision in 1984, our civil rights statutes have become an impotent shield against the evils of discrimination and our once vigorous Federal enforcement efforts have been replaced by bureaucratic paper chasers to pinpoint the exact location of Federal dollars with disastrous consequences. It was never the intent of Congress, not before *Grove City* and not today.

Now, a point that I want to raise: I know there are some members who believe that the Civil Rights Restoration Act is the appropriate vehicle for furthering other agendas. That is just plain wrong. In the last Congress, this bill died largely of disputes over abortion. I find it absolutely shameful that a civil rights measure of such magnitude should become the vehicle for attempting to redefine national policy on the reproductive rights of women. I find it absolutely shameful that we tried to get into the debate on the religious exemption which in effect would allow our religious institutions or give them a license to discriminate. This is not the vehicle to take this onto, and all it does is to go ahead and slow down the passage of this particular legislation.

It is time to get beyond those disputes. Too many have lost too much as a result of the *Grove City* decision to allow the bill to again be sidetracked. With the civil rights of millions of Americans at stake, we cannot fail to act.

I want to make one point clear at the outset of this debate and that is I intend to support the chairman, not only substantively, that is very clear, but also procedurally. So if we think we are going to get into any ploys in the sense of extending the debate here in the committee or trying to go ahead and extend it on the floor, fine, let them try. We have lost as far as I am concerned, my side lost its opportunity. I am sorry it was not passed, but I know one thing, it is going to pass in the year 1987 and that is going to require Republicans and Democrats to work together and the chairman has my total support, both substantively and procedurally.

Thank you.

The CHAIRMAN. Thank you very much.

The Senator from New Hampshire, Senator Humphrey.

OPENING STATEMENT OF SENATOR HUMPHREY

Senator HUMPHREY. Thank you, Mr. Chairman. If there is one thing you learn around this place, the more attractive the title of a bill the more suspicious you should be of it. I think that is so in every case and it is so in this case.

This bill is styled the Civil Rights Restoration Act, shrewdly so, but the title is fundamentally misleading, and the proponents' broader descriptions of what this bill will do and will not do have been equally misleading.

The Supreme Court's decision in the *Grove City* case was not a major setback for civil rights, despite the repetitive claims to the contrary. That decision merely recognized that where Federal funds are dispensed only in connection with a specific program of an institution, for example, the student loan program of a university, all of the other varied components of that institution are not automatically covered by the Federal regulations which are tied to Federal funding.

May I point out that the decision had absolutely nothing to do with the many Federal civil rights laws, laws as opposed to regulations such as title VII, which apply regardless of whether or not an institution receives any Federal funds.

Now, in the guise of "restoring" civil rights which were never taken away, this new bill would actually expand Federal regulation to unprecedented degrees and in novel settings. I find that shameful, if I can borrow a word that I think is overused sometimes. If even a single obscure component of an institution receives a dollar of Federal assistance, whether directly or through recipients, then all the operations of the institution, however large or small, every last operation of that institution then becomes covered by the full panoply of the Federal civil rights regulations.

The implications of passing this sweeping new law are disturbing and should cause Congress to reject it. Examples: every school in a religious school system will now be regulated in its entirety if any one school in the system happens to receives even a dollar of Federal financial assistance.

Example: University affiliated hospitals with even a single federally assisted medical student will be covered by title IX regulations requiring them to provide abortions on the same basis as any other medical procedure, and I think that is shameful. I think the killing of prenatal human beings is shameful. I think it is shameful and obnoxious to require institutions which have moral objections to killing prenatal infants to do so notwithstanding their moral objections. All student medical assistance plans will likewise be required to extend coverage to abortions.

Example: Local grocery stores participating in the food stamp program will be subject to burdensome new regulations affecting their entire operations solely by virtue of their participation in that program.

Example: Farmers, large and small, who receive crop subsidies or price supports will be subjected to inappropriate and burdensome Federal regulation. One could go on for hours listing the bizarre examples that will become reality if this oversold bill is enacted.

S. 557 is not a Civil Rights Restoration Act. It is a "Federal Regulatory Expansion Act," which will impose totally unjustified and oppressive regulatory burdens into every corner of our society and upon our economy.

Thank you.

The CHAIRMAN. Thank you, Senator.

We will move to the first panel. I will ask them if they will be good enough to come forward: Benjamin Hooks, Chairman of the Leadership Conference on Civil Rights; Eleanor Smeal, president, National Organization for Women; Edward Kennedy, Jr., executive director for Facing the Challenge, in Boston; Kermit Phelps, chairman of the Board of Directors, American Association of Retired Persons: and E. Richard Larson, vice president for legal programs, Mexican American Legal Defense and Educational Fund, Los Angeles.

We will start off, if we could. Mr. Hooks, we are delighted to have you. You are very familiar to our committee. We always value your testimony and we welcome you here this morning.

STATEMENTS OF BENJAMIN HOOKS, CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; ELEANOR SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.; EDWARD M. KENNEDY, JR., EXECUTIVE DIRECTOR, FACING THE CHALLENGE; KERMIT PHELPS, CHAIRMAN, BOARD OF DIRECTORS, AMERICAN ASSOCIATION OF RETIRED PERSONS; AND E. RICHARD LARSON, VICE PRESIDENT FOR LEGAL PROGRAMS, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Mr. HOOKS. Thank you, sir.

Mr. Chairman and members of the committee, my name is Benjamin Hooks. I am the executive director of the NAACP and the chairperson of the Leadership Conference on Civil Rights, which is a coalition of 185 national organizations representing minorities, women, disabled persons, senior citizens, labor, religious groups and minority businesses and professions.

On behalf of the leadership conference, I want to thank the committee for allowing me the opportunity to testify today. Our conference enthusiastically endorses the bipartisan Civil Rights Restoration Act. The Restoration Act is one of the two top priorities of the leadership conference for this 100th Congress.

We applaud the leadership of the nine Democratic and two Republican Senators on this committee who, along with 43 other Senators, have cosponsored this vital legislation. We are confident that the Senate and the House will enact the Restoration Act this year. Well, there is no more important measure before the Congress and further delay would be unconscionable.

Title VI of the 1964 Civil Rights Act, title IX of the 1972 Education Amendments, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 have been extraordinarily effective civil rights statutes.

The intent of these laws was best expressed by Senator Kennedy in explaining the purpose and scope of the first of these laws, title VI. He said,

> Simple justice requires that public funds to which all taxpayers of all races contribute not be spent in any fashion which encourages, subsidizes or results in racial discrimination.

By prohibiting the Federal funding of discrimination against minorities, women, disabled persons and senior citizens, these four statutes have desegregated much of America and provided equality of opportunity for millions of our Nation's citizens. But because of the Grove City and Darrone Supreme Court decisions and the interpretation of these decisions by the present Justice Department, we no longer have comprehensive and effective title XI, title IX, section 504 or Age Discrimination Act. The Court, by adopting the program specific analysis, has drastically weakened the Nation's civil rights statutes.

There is no longer broad coverage of these laws. Unless the discrimination now is tied specifically to a federally assisted program, race, sex, disability and age discrimination cannot be investigated or its correction required.

These decisions affect almost every recipient of Federal funds, including schools, hospitals, correctional facilities, airport authorities, State highway departments and municipal utilities.

The bottom line is that it is now legally permissible for the Federal Government to subsidize discrimination against minorities, women, disabled persons and senior citizens. Yes, in 1987, our bicentennial year of the Constitution, the Federal government may now use taxpayers' monies to fund discrimination. The Civil Rights Restoration Act will remedy this situation.

It would simply clarify the intent of Congress with respect to these factors. It would restore them to the broad scope and coverage that was originally intended by Congress and that has marked their administration until very recently.

Over the past 3 years, scores of witnesses have testified on behalf of the Restoration Act. These witnesses, including 14 former high-ranking officials from the Johnson, Nixon, Ford, and Carter administrations, have all stated that the Restoration Act will simply reaffirm previous judicial and executive branch interpretations and enforcement practices which gave broad coverage.

There is no question that substantial bipartisan majorities in the Senate and in the House support the Civil Rights Restoration Act, but the opponents have thus far delayed enactment by employing a variety of tactics.

We believe that now the Members of the Senate and the House better understand the real issues. They realize that if we do not pass the Restoration Act, millions of citizens will continue to be deprived of the protections of our civil rights statutes. Knowing that the viability and effectiveness of these four statutes is at stake, Senators and Representatives will resist the attempts of those who seek to use this Restoration Act to change substantive civil rights laws.

Two amendments in particular proved troublesome in the 99th Congress. The first amendment would have broadened the religious exemption in title IX. It would have created a huge loophole and allowed hundreds of schools and colleges not now eligible for religious exemption to escape from title IX coverage. Such schools would, in effect, have been given a "license to discriminate."

The second amendment, rather than being a neutral amendment, would have actually repealed long-standing title IX regulations. Because these amendments undermined the restoration principle and would have changed substantive law, we vigorously opposed them.

I want to emphasize as strongly as possible that we would oppose any amendments which would alter substantive civil rights laws, irrespective of the merit of these amendments. In fact, with respect to the abortion issue, the Leadership Conference, the NAACP, and most organizations in the civil rights coalition do not have a position.

But we do oppose any efforts to turn the Restoration Act into a vehicle for anyone's substantive legislative agenda. If passed, the abortion and religious tenet amendments would open the floodgates to other substantive amendments and the Restoration Act would become a legislative "Christmas tree" bill and the principle would unravel and the Act would die.

We ask those who have embarked on a substantive amendment strategy to cease and desist. Stop, please, obstructing this measure. If you want to implement substantive changes in the law, please find another vehicle. To take advantage of the Restoration Act for your own purposes is to take advantage of the millions of minorities, women, disabled persons, and senior citizens who need the protections of these civil rights statutes.

Mr. Chairman, one final point: For the past 6 difficult years, cohesion has been the hallmark of the civil rights Coalition on the Restoration Act, the Voting Rights Act and on the executive order we have been one for all and all for one, and this year unity will prevail once again. Thank you.

[The prepared statement of Mr. Hooks and responses to questions submitted by Senator Hatch follow:]

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Statement of the Leadership Conference on Civil Rights

Supporting the Civil Rights Restoration Act

Benjamin L. Hooks, Chairperson

March 19, 1987

Mr. Chairman and members of the Committee, my name is Benjamin L. Hooks. I am the Executive Director of the NAACP and the Chairperson of the Leadership Conference on Civil Rights, a coalition of 185 national organizations representing minorities, women, disabled persons, senior citizens, labor, religious groups, and minority businesses and professions. On behalf of the Leadership Conference, I want to thank the Committee for allowing me the opportunity to testify today.

The Leadership Conference on Civil Rights enthusiastically endorses the bipartisan Civil Rights Restoration Act. The Restoration Act is one of the Leadership Conference's two top legislative priorities for the 100th Congress.

We applaud the leadership of the nine Democrats (Senators Kennedy, Metzenbaum, Simon, Mikulski, Pell, Matsunaga, Dodd, Harkin, and Adams) and the two Republicans (Senators Weicker and Stafford) on this Committee who, along with 43 other Senators, have cosponsored this vital legislation.

"Equality In a Free, Plural, Democratic Society"

37th ANNUAL MEETING • 1987 • WASHINGTON, D.C.

Mr. Chairman, We are confident that the Senate and the House will enact the Restoration Act this year. For there is no more important measure before the Congress. And further delay would be unconscionable.

Title VI of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 have been extraordinarily effective civil rights statutes.

The intent of these laws was best expressed by President John F. Kennedy in explaining the purpose and scope of the first of these laws, Title VI of the 1964 Civil Rights Act:

> "Simple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion which encourages, subsidizes, or results in racial discrimination."

By prohibiting the federal funding of discrimination against minorities, women, disabled persons, and senior citizens, these four statutes have desegregated much of America and provided equality of opportunity for millions of our nation's citizens.

But, because of the Grove City and Darrone Supreme Court decisions, and the interpretations of these decisions by the Justice Department, we no longer have a comprehensive and effective Title VI, Title IX, Section 504, or A.D.A. The Court, by adopting the program-specific analysis, has drastically weakened the nation's civil rights statutes. There is no longer broad coverage of these laws. Unless the discrimination is tied specifically to a federally assisted program, race, sex, disability, and age discrimination cannot be investigated or its correction required.

These decisions affect almost every recipient of federal funds, including schools, hospitals, corporations, correctional facilities, airport authorities, state highway departments, and municipal utilities.

The impact of the Supreme Court decisions was immediate. On March 8, 1984--a little over a week after the Grove City College decision--the Department of Education dropped sex discrimination charges against the University of Maryland's intercollegiate athletics program because the athletics program did not receive direct federal funding.

The Department's Office for Civil Rights--which enforces Title VI, Title IX, Section 504 and the Age Discrimination Act as they apply to education--had uncovered sex discrimination in several areas, including travel and per diem allowance, the provision of support services, and the accommodation of student interests and abilities. Yet, female athletes and coaches at the University of Maryland and other universities no longer had federal protection against this discrimination.

The University of Maryland case was just the beginning. Since the Grove City College decision, scores of cases in the Department of Education have been closed, limited or suspended. The majority of these are Title IX cases, but many Section 504 cases and Title VI cases also have been affected.

In addition, dozens of other cases that were in the formal enforcement stage are jeopardized. These are cases where discrimination has been found, voluntary compliance was refused, and recipients used the Supreme Court's decision as a defense against federal enforcement.

The decision has created absurd results in many instances. Complaints are not investigated because the alleged discrimination took place in a building not constructed or renovated by federal loans to the institution. When complaints are investigated, the whole process takes longer because the federal government has to search for federal money connected with a specific program.

As a result of these delays, clear violations of federal law go uncorrected while students lose valuable education that can rarely be recovered and employees lose jobs or are denied them. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars.

Except in cases where school districts receive impact aid, Title VI is being construed as applying only to specific classrooms or programs that receive federal funds. For example, since the Mecklenburg County, Virginia system desegregated, Black students have generally been assigned to the "lowest ability" classes. In the elementary grades, this segregation extends even to music, art and physical education classes. The Department of Education's Office for Civil Rights found the county in violation of Title VI but the case was dismissed by an administrative law judge because the ability grouping does not occur in a program receiving federal funds.

Similar problems have developed with respect to civil rights enforcement in the Department of Health and Human Services and in other federal agencies.

Health facilities have raised the Grove City College decision as a defense in dozens of HHS administrative complaints that allege discrimination under Section 504. Similarly, court cases have been adversely affected by the Grove City College decision. In Foss v. City of Chicago, 640 F. Supp. 1088 (N.D. Ill. 1986) the court ruled that a handicapped firefighter could not sue under Section 504 because the alleged discrimination did not occur in the specific program receiving federal funds. A similar decision was rendered in Chaplin v. Consolidated Edison Co. 628 F. Supp. 143 (S.D. N.Y. 1986) in which an "otherwise qualified" disabled applicant who was turned down for a job sued under Section 504.

The bottom line is that it is now legally permissible for the Federal Government to subsidize discrimination against minorities, women, disabled persons, and senior citizens. Yes, in 1987, the Bicentennial year of the Constitution, the federal government may use taxpayers' monies to fund discrimination.

The Civil Rights Restoration Act would remedy this reprehensible situation. It would simply clarify the intent of Congress with respect to these civil rights statutes. It would restore them to the broad scope and coverage that was originally intended by Congress and that has marked their administration until very recently.

Over the past three years, scores of witnesses have testified on behalf of the Restoration Act. These witnesses, including 14 former high-ranking officials from the Johnson, Nixon, Ford, and Carter Administrations have all stated that the Restoration Act will simply reaffirm previous judicial and executive branch interpretations and enforcement practices which gave broad coverage to our anti-discrimination provisions.

There is no question that substantial bipartisan majorities in the Senate and in the House support the Civil Rights Restoration Act. But opponents have thus far delayed enactment by employing a variety of tactics.

In the 98th Congress, the House passed a restoration bill by a vote of 375-34. Despite 68-70 Senate votes supporting the House-passed measure, Senator Orrin Hatch was able to filibuster the measure to death in the waning days of the second session. Proponents did not run out of votes. They just ran out of time.

In the 99th Congress, stalling tactics alone could not kill the bill, so a different strategy went into effect. Opponents of a restoration act introduced amendments which went beyond mere restoration of coverage and actually amended substantive civil rights laws. They converted a coverage bill into a bill with controversial substantive amendments. That strategy was successful in the 99th Congress. But it will not succeed in the 100th Congress.

Members of the Senate and the House now better understand the real issues involved. They realize that if we do not pass the Restoration Act, millions of citizens will continue to be deprived of the protections of our civil rights statutes. Knowing that the viability and effectiveness of these four statutes is at stake, Senators and Representatives will resist the attempts of those who seek to use the Restoration Act to change substantive civil rights laws.

Two amendments in particular proved troublesome in the 99th Congress. The first amendment would have broadened the religious exemption in Title IX. It would have created a huge loophole and allowed hundreds of schools and colleges not now eligible for religious exemption to escape from Title IX coverage. Such schools would, in effect, have been given a "license to discriminate."

The second amendment was the so-called "Tauke-Sensenbrenner abortion-neutral" amendment. Rather than being a neutral amendment, it would have actually repealed long-standing Title IX regulations regarding abortion.

Because these amendments undermined the restoration principle and would have changed substantive law, we vigorously opposed them.

I want to emphasize, as strongly as possible, that we oppose any amendments which would alter substantive civil rights law, irrespective of the merit of these amendments. In fact, with respect to the abortion issue, the Leadership Conference, the NAACP, and most organizations in the civil rights coalition, do not have a position.

But we do oppose any efforts to turn the Restoration Act into a vehicle for anyone's substantive legislative agenda. If passed, the abortion and religious tenet amendments would open the floodgates to other substantive amendments. The Restoration Act would become a legislative "Christmas tree" bill. The restoration principle would unravel. And the Restoration Act would die.

We ask those who have embarked on a substantive amendment strategy to cease and desist. Stop obstructing this measure. If you want to implement substantive changes in the law, please find another vehicle. To take advantage of the Restoration Act for your own purposes is to take advantage of the millions of minorities, women, disabled persons, and senior citizens who need the protections of these civil rights statutes.

In addition to the substantive amendment strategy, opponents of the Restoration Act are also supporting other legislation that supposedly would remedy the adverse effects of the Grove City decision. It would not. The Administration drafted bill, supported in the 99th Congress by Senator Hatch and several other Senators, is a woefully inadequate, if not destructive, bill.

First, that Meese-Reynolds measure deals specifically only with education. It does not clearly ban discrimination with the use of federal assistance in areas outside of education--for example, in health, social services, transportation, and housing.

As to these areas, the bill says only that the law shall be construed "without" reference to the Grove City decision. It in no way precludes the Supreme Court from reaching the very same restrictive result it reached in Grove City.

Indeed, the danger of this vague and general provision can be seen by looking at Senator Hatch's statement accompanying the introduction of the Meese-Reynolds bill in 1985. In his statement (page S637 of the January 24, 1985 Congressional Record), Senator Hatch contends, contrary to an overwhelmingly bipartisan congressional consensus, that the Supreme Court was legally correct in Grove City. He states that before Grove City, Title VI, Title IX, Section 504, and the Age Discrimination Act were "construed in a program-specific manner."

If the Administration bill passed and if the Supreme Court once again agreed with Senator Hatch's interpretation of pre-Grove City law, federal funding of discrimination would, to a large extent, remain the law of the land.

The current Administration position is baffling. Why would Messrs Meese and Reynolds now oppose the federal funding of discrimination in education and yet permit the federal funding of discrimination in areas outside of education?

Some examples of discrimination that could be lawful if the Administration bill passed:

(a) A black patient could be denied medical care at a state hospital even though the state hospital system receives federal funds,so long as the funds were not traceable to the particular hospital and unit where the discrimination occurred.

(b) A state that receives federal funds could refuse to permit the adoption of disabled children if the funds are not traceable to the particular unit responsible for adoption.

(c) If people over the age of 55 are denied immunization by a city clinic's policy of providing such services only to the working-age population thus defined, such discrimination would be permitted even though the city received federal funds for health services, unless the funds were traceable to this particular service.

Even as to education, the bill does not clearly restore the broad coverage that existed prior to the Grove City decision. Where federal assistance goes to a public school system, it is not at all clear under the Administration bill that the entire system would be prohibited from discriminating as was the case prior to Grove City.

Example: Girls in elementary and high schools could be denied access to vocational and technical courses even though the public school system receives federal funds, if the assistance is not traceable to the particular school or course.

With respect to the education section of the Administration bill, there is another serious flaw. The bill uses the term "educational institution" and states that such an institution will be covered in its entirety. However, the very term "educational institution," which is already used in Title IX for other purposes, is defined in Title IX to include or to mean departments of colleges and universities. Therefore, the Administration bill could lead to the very result reached in the Grove City case--assuring only that the financial aid department of the college is covered, but not covering the whole college itself. In short, the Administration bill could result in no improved protection either in or outside education.

Thus, while the Meese-Reynolds bill purports to remedy the consequences of the Grove City decision, it could leave millions of Americans unprotected by our civil rights laws. Such a result is unacceptable to those who believe in equality of opportunity for all our nation's citizens.

Mr. Chairman, in response to scare tactics that have been used, the Civil Rights Restoration Act does include several clarification amendments which were drafted by House Republicans and Democrats. While the Leadership Conference does not believe that these amendments were necessary substantively, they do address the unfounded fears that were raised regarding such issues as ultimate beneficiaries, the "Ma & Pa" grocery store, the scope of the Title IX religious exemption, and corporate coverage. In particular, these amendments take care of the ridiculous assertions that students, individual farmers who receive crop subsidies, and food stamps recipients would now be covered by the civil rights laws.

Mr. Chairman, one final point. For the past six difficult years, cohesion has been the hallmark of the civil rights coalition. On the Restoration Act, on the Voting Rights Act, on the Executive Order on Affirmative Action, and on countless other issues, it has been one for all and all for one. We know that equality is indivisible. That is why we have been so successful in helping to preserve a bipartisan congressional consensus on civil rights issues.

And this year, unity will prevail once again. The more than 200 national organizations that support the Restoration Act willl steadfastly resist any attempts to pass amendments which change substantive law, regardless of the nature of these amendments. United we stand and united we will help enact the Civil Rights Restoration Act.

Thank you Mr. Chairman and members of the Committee for the opportunity to testify today.

Questions for Mr. Hooks

1. On page 2 of S. 557, reference is made to "certain aspects of recent decisions and opinions of the Supreme Court" that have unduly narrowed or cast doubt upon the broad application of the four statutes addressed in S. 557. Would you please explain the aspects and the decisions which are being referenced by this language?

2. In its prepared testimony, the Department of Justice cites a series of cases which it believes support the proposition that the four statutes addressed in S. 557 were interpreted to be program specific prior to the Supreme Court's decision in *Grove City*. Do you agree with the Department's characterization of those cases. (The case names are attached and can be found in footnote 2.)

If your answer is no, please explain your different interpretation of these cases?

3. If the purpose of S. 557 is to return the law to what it was prior to the *Grove City* decision, then what would be the precedential value of these cases upon enactment of S. 557?

4. Please explain the meaning and provide an example of the term, "special purpose district", which is found in paragraph (1)(A) of S. 557?

5. Please explain the meaning and provide an example of the term, "instrumentality of a state or of a local government", which is found, for example, on page 2, paragraph (1)(A) of S. 557?

6. Please explain the meaning of the phrase, "and each other entity," which is found, for example, on page 3, paragraph (1)(B) of S. 557?

7. If a state government receives federal funds which are in turn distributed to various state agencies, would these state agencies be covered under the definition of progam or activity, in paragraphs (1)(A) and (B) as found, for example, on page 8, of S. 557? If your answer is yes, please explain how they are covered.

8. Continuing with the example mentioned in the previous question, if state agencies are awarded state contracts or grants

with these federal funds, would the recipients of such funds be covered under the portion of paragraph (1)(B) which refers to "(and each other entity) to which the assistance is extended"? If your answer is yes, please explain how they are covered. Would they be covered by some other provision in the bill?

9. Again, continuing with the example mentioned above, if the recipients of federal funds awarded to the state agency use those funds to purchase goods or services, would the providers of such goods or services be an entity subject to federal regulation under the definition of program or activity found in S. 557? If your answer is yes, please explain how they would be covered.

10. What is the correct interpretation of subsection (4) found, for example, on page 9 of S. 557, which refers to "any combination comprised of two or more of the entities described in paragraph (1), (2), or (3)"?

11. Would you give an example of the type of entities covered by subsection 4?

12. Would an entire church, such as the Catholic Church, be a "combination" as the word is used in section 4 if two or more parishes are recipients of federal financial assistance?

13. Would subsection 4 require coverage of an entire state government if two or more agencies, offices or divisions of that government received assistance?

14. Please explain the statutory language which, prior to the decision by the Supreme Court in Grove City, authorized treatment of organizations principally engaged in the business of providing education, health care, housing, social services, or parks and recreation in a manner different from other organizations?

15. Would you please provide an example of the type of business that would be covered under subsection (3)(A)(i), found on page 9 of S. 557, and the federal assistance that would result in such coverage?

16. Would you please explain what types of businesses are included in the term "health care," as it is used, for example, on page 9, in subsection (3)(A)(ii)?

17. Please explain who is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

18. In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S.557 excluded from coverage under the four statutes addressed in legislation?

In Grove City, the Supreme Court decided that federal education aid to a student constitutes Federal financial assistance to the college, even though the college received no direct federal aid. The Court also ruled that because the student grants funded only the college's student aid program, it was that "program or activity", not the entire educational institution itself, that was covered by the antidiscrimination provision.

The second ruling, the program-specific ruling, broke no new legal ground. The coverage of the federally-aided program rather than the entire institution merely reflected the more persuasive reading of the plain language of Title IX (and the other three cross-cutting statutes). 1/ Similarly, Title IX's legislative history supports the Supreme Court's program-specific reading of its scope. And, the weight of caselaw before Grove City favored the program-specific reading. 2/ Nonetheless,

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1/ The Department of Education had not been adhering to this programmatic limitation prior to 1984.

2/ Compare, e.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) (Federal scholarship and loan aid to a college subjects only the college's student aid program to Title IX coverage), vacated and remanded in light of Grove City College v. Bell, 466 U.S. 901 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982) (reaffirming earlier decision holding that Title IX is program-specific); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (assistance provided to the Harvard Law School financial aid program, apparently through a college work-study program, does not constitute assistance to the entire law school educational program: Title IX complaint

(FOOTNOTE CONTINUED)

the Administration believed that there were sound policy reasons for congressional consideration of a measured and tailored legislative response to the Grove City decision, one that provided for institutional coverage under Title IX and the other three cross-cutting statutes of all educational institutions receiving Federal financial assistance. We support such legislation in the 100th Congress as we did in the last two Congresses.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

must allege discrimination in the particular assisted program within the institution), cert. denied, 456 U.S. 928 (1982); Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) ("on the basis of the language of Section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under Section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefitted by federal financial assistance") (footnotes omitted); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (Federal aid to a company's work training program subjects only that program, not the entire company, to Section 504 coverage); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983) (Federal aid to conduct seminars on alcohol abuse does not bring the society's activity of certifying medical technologists within Section 504 coverage); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (University's intercollegiate athletic program not subject to Title IX coverage because it did not receive Federal financial assistance), with e.g., Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982) (Title IX); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980) (Section 504); Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Title VI).

LC
CR
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on Civil Rights**

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*Deceased

April 23, 1987

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Senator Kennedy:

In response to your letter of April 10, 1987 I am forwarding reponses to Senator Hatch's questions on S. 557, The Civil Rights Restoration Act of 1987.

On behalf of the Leadership Conference on Civil Rights, I would like to thank you for your leadership on this vital civil rights legislation.

With warm personnal regards,

Sincerely,
Ben
Benjamin L. Hooks

"Equality In a Free, Plural, Democratic Society"

37th ANNUAL MEETING • MAY 4-5, 1987 • WASHINGTON, D.C.

Responses to Senator Orrin Hatch's Questions on S. 557
to Benjamin Hooks, Chair of the Leadership
Conference on Civil Rights

1. The decisions referred to in the preamble of the bill include Grove City College v. Bell, 465 U.S. 555 (1984) and Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). The aspects of those decisions referred to in the preamble are those construing the words "program or activity" in the statutes.

2. I disagree with Deputy Assistant Attorney General Mark R. Disler's assessment of the weight of caselaw prior to Grove City College v. Bell, 465 U.S. 555 (1984). My research clearly shows that the weight of caselaw supported broad interpretation of the coverage afforded by the four civil rights statutes, notwithstanding the 7 cases cited by Mr. Disler in support of his position.

Numerous Federal Courts of Appeals and District Court decisions have been premised on broad interpretations of the breadth of coverage.

> United States v. El Camino Community College District, 454 F. Supp. 825 (C.D. Cal 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (the Department of Health, Education and Welfare may investigate an entire College's compliance with Title VI regardless of the funding to specific programs in the College)
>
> Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (Title VI covers law school's privately funded student financial aid resources because school is housed in structure built with federal financial assistance)
>
> Board of Public Instruction of Taylor Co. v. Finch, 414 F.2d 1068 (5th Cir. 1969) (assumes basic Title VI coverage of the entire school district, limitations are placed only on the funds to be terminated under Sec. 602)
>
> Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (Veterans Administration educational grants for students are aid to the university as a whole)
>
> Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974) (national origin discrimination under Title VI and the Constitution brought by Spanish surnamed parents and students involving curriculum content, employment discrimination, and services to rectify language deficiences -- the Court held that under Title VI, the appellees have a right to bilingual education, yet there was not inquiry into

the amount or type of federal funding or how it was used in the district)

United States v. Jefferson Co. Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied sub nom Caddo Parish Board of Education v. United States*, 389 U.S. 840 (1967) (Order for desegregation suit under Title VI covers student participation in all aspects of school life, including extracurricular activities, athletics, etc., without inquiry into which activities were federally funded.

Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (suit to force integration of school system for children of Black air force base personnel --school system received nearly $2 million in federal aid between 1951 and 1964. "The Bossier Parish School Board accepted federal assistance in November 1964, and thereby brought its *school system* within the class of *programs* subject to the Section 601 prohibition against discrimination." 370 F.2d 852 (Emphasis supplied.))

Yakin v. University of Illinois, 508 F. Supp. 848 (N.D. Ill. 1981) (graduate student sued for national origin discrimination when he was terminated from the doctoral program in the psychology department. As long as the University received federal financial assistance, it was unnecessary for the student to prove his department or program received federal assistance)

Haffer v. Temple University, 524 F. Supp. 531 (E.D.Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982) (Intercollegiate athletic program which does not receive federal funding earmarked for athletes nonetheless is covered under Title IX)

Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982) (because all of a college's departments benefit when a college receives indirect, "nonearmarked' assistance, the entire institution must be considered the 'program or activity' under Title IX)

Wolff v. South Colonie Central School District, 534 F. Supp. 758 (N.D.N.Y. 1982) (rights of disabled student to participate in school trip are covered by Section 504, without proof of federal funding for school trips)

Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980) (high school student with only one kidney is entitled to wrestle, without proof of federal funding for high school athletics)

Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa.

1981) (undergraduate with sight in only one eye secures right to play football, without proof that the University receives federal funding for athletics)

Doe v. Syracuse School District, 508 F. Supp. 333 (N.D.N.Y. 1981) (no review of the nature of federal funding necessary prior to evaluating employment practices of school district which had a discriminatory effect on the application of a teacher)

Garrity v. Gallen, 522 F. Supp. 171, 212-13 (D.N.H. 1981) (the Court found the entire Laconia State School was covered for sec. 504 purposes)

Until 1982 only one court of appeals had interpreted Title IX as narrowly as the Grove City decision. (Rice v. President and Fellows of Harvard College, 663 F.2d 336, (1st Cir. 1981)). However, during oral argument in the North Haven case the Solicitor General of the United States said in answer to a question that he believed the scope of Title IX coverage was the same as the scope of the authority to terminate funds. Dicta in the Court's decision suggested agreement with his view. Two courts of appeals had read Section 504 so narrowly (Brown v. Sibley, 659 F.2d 760 (5th Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980). No court had suggested that either Title VI or the Age Discrimination Act was so narrow.

Moreover, some cases which hold only that the termination provision is narrow have been misconstrued to apply to coverage as well. Prime among these cases is Board of Public Instruction of Taylor Co. v. Finch, 414 F.2d 1068 (5th Cir. 1969) which while limiting the scope of termination strongly suggests that coverage is broad. Similarly, a case cited by Mr. Disler, Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982), should be cited as a case which held that the termination provision is narrow and not that the prohibition against discrimination is program-specific.

In Lau v. Nichols, 414 U.S. 563 (1964) in deciding whether the denial of needed special English instruction to Chinese students was a Title VI violation, the Supreme Court noted merely that the San Francisco school district "receives large amounts of federal financial assistance..." The Court did not indicate any concern about whether specific programs of English instruction received federal funds.

As the above discussion clearly documents, the weight of court authority prior to Grove City supported institution-wide coverage. This interpretation is consistent with the legislative history and administrative enforcement history of these laws. From the passage of Title VI until the present Administration took office, federal officials consistently enforced the statutes institution-wide.

3. To the extent that the holdings in these cases are substantially the same as the program-specific holding in Grove City, they will be overruled by passage of S.557.

4. The term "special purpose district" would include, for example, the special district of St. Louis, Missouri County which serves handicapped children.

5. The term "instrumentality of a state or of a local government" is not new. A virtually identical term has been in the Department of Education's Title VI regulations since they first were promulgated. See 34 C.F.R. S100.13(1) ("The term 'recipient' means any...instrumentality of any state or political subdivision...") The term would include, for example, a regional transportation board and the Triborough Bridge Authority in New York.

6. The phrase "and each other entity" includes any state government unit which is not a "department or agency," *e.g.*, a school board or a water board.

7. Yes, all the operations of the state agencies to which the funds are distributed would be covered under Title VI, Sec. 504, and the Age Discrimination Act. Similarly, all their education functions would be covered by Title IX.

8. S.557 provides that each state or local government entity to which federal financial assistance is extended is covered by the four civil rights statutes. This includes instances where state governments receive federal funds and distribute those funds to other departments, agencies, or other entities within the state. For example, where a state education department distributes Chapter 1 funds to school districts within the state, both the state department and the local school districts would be covered. This is consistent with pre-Grove City coverage. Contracts of procurement or guarantee are explicitly excluded from coverage under the statutes amended by S.557.

9. Again, contracts of procurement or guarantee are not covered under the statutes. Contracts for federal financial assistance are covered. See answer to #8.

10. It is my understanding that the term "combination comprised of two or more of the entities described in paragraphs (1), (2), or (3)" is intended to include hybrid entities, for example, a state agency and a private corporation.

11. Examples of the type of entities covered by subsection 4 include: TVA; a regional or metropolitan transit authority; or a metropolitan planning commission.

12. No. See answer to question no. 10.

13. No.

14. Prior to Grove City, these corporations were not treated differently from other corporations. Coverage has always been corporation-wide for all types of corporations. In the interest of passing the CRRA, however, the bill's sponsors have agreed to limit coverage for most corporations to be plant-specific. Corporations principally engaged in the business of providing education, health care, etc. however, are covered in their entirety, as they were prior to Grove City, because of their unique public functions.

15. Examples of businesses that would be covered under subsection (3)(A)(i) include: Chrysler bailout and Lockheed.

16. Among the types of businesses included in the term "health care" in the bill are: hospitals, hospices and nursing homes.

17. The subsection of the regulations defining the term "recipient" provides that "such term does not include any ultimate beneficiary under any such program." E.g., 34 C.F.R. §100.13(i) (Title VI Department of Education). Students, for example, are "ultimate beneficiaries" and not "recipients" of federal financial assistance.

18. yes.

April 22, 1987

The **Chairman**. Thank you very much.

We will go to our second witness, Ellie Smeal. We have got a very full agenda for the day. We have limited time in terms of our hearings, so we are going to ask everyone to make their case but to do it with the clarity and brevity which we know that they can do.

Ellie, we are delighted to have you back here before our Committee and we look forward to your testimony.

Ms. **Smeal**. Thank you very much, Mr. Chairman.

I want to thank you for holding these hearings very promptly and for your strong support of the Civil Rights Restoration Act. I am here today on behalf of the National Organization for Women, which is the largest organization that is dedicated to eliminating sex discrimination, and I am also here as a member of the President's Council, which represents the leadership of some 37 major women's groups, including the American Association of University Women, the League of Women Voters, Business and Professional Women, Church Women United, the YWCA, and B'nai B'rith Women, which all have over four million members in some 8,000 local congressional districts, all the local congressional districts, which has placed—the President's Council has placed the Civil Rights Restoration Act as a major plank in our shared agenda for the 100th Congress.

I am submitting formal testimony that is quite long and it is very detailed as to the statistics of title IX. I would like to summarize the testimony.

The **Chairman**. Your full statement will be included in the record as if read.

Ms. **Smeal**. The first major point of our testimony is, of course, that we support the restoration principle, simply we want to restore the major four statutes with no amendments of any substance.

I am going to concentrate my remarks on Title IX, which is the plank dealing with education and sex discrimination. In preparing the testimony, we have now reviewed the statistics of the impact of title IX and there is no person I believe that could review the statistics without being impressed with the success of title IX. It has been absolutely unprecedented and there is virtually no negative impact of the bill.

When we were fighting for title IX, and the feminist movement fought very hard and long for title IX not only to be passed but for it to be enforced. A lot of people had a parade of horribles of what could or may happen. None of those things happened. In fact, instead, what happened is you saw unprecedented advances for women in all sorts of professional schools and athletics and jobs and every aspects of education and in all of these statistics we have provided charts which go from the period of the early seventies all the way to the present, and it is spectacular.

But what is happening today, and that is the important thing, and we want to concentrate on enforcement and compliance. You know, and the National Women's Law Center is releasing today a study which is going to show how many cases were immediately dropped after the *Grove City* decision. But this only represents a small fraction of our problems today and our problems are mammoth. They are not little.

We first have essentially slowed or gutted the compliance review process, the entire process of bringing title IX complaints. Before *Grove City*, the Department of Education felt that they could do audits or compliance reviews wherever they suspected in an institution the practice of sex discrimination. Today, they can only go in for specific programs and they are doing very few reviews.

Secondly, the compliance process has slowed way down and I wanted some tough data for you and it is really something when not only do we need to be advocacy groups but we almost have to do all the monitoring and enforcement that normally the government should be doing.

Anyway, we have been doing our own review and I want to show you one example. The Office of Sex Equity in Ohio—I thought that would be interesting for Senator Metzenbaum—the State Department of Education there provided NOW the following information describing the complaint slow-down process.

In 1983-84, the Ohio department received 66 title IX compliance requests; then they received in 1984-85 427 compliance requests; then in 1985-86 they received 1,418 such requests. But then what happened? In the first place, they got these requests because the local office was doing a good job and had high visibility, but it also showed the need for title IX.

But what happened as a result of these requests? Only 7 out of the 1,418 requests in 1985-86 actually resulted in complaints filed and ruled on by OCR, the Office of Civil Rights of the Department of Education, and of these 7, 6 dealt with athletics and were dropped because they are not directly funded. One was dealt with. Why? It is because they are discouraging the filing of the complaints and they are saying you can't trace the Federal funds and essentially we have no enforcement going on.

One of the things—and I am going to skip because of time—to try to describe to you the best I can in lay terms this process, is that a lot of people think because *Grove City* dealt with the financial aid office, that at least that is today being covered. I mean, goodness heavens, is anything being covered by title IX?

If you look at the financial aid section, you would say, well, we know that 85 or 80 percent of all financial aid at the college level is being funded by the Federal Government, and so surely to goodness they should be doing something in this area.

A major study has been just released which shows that even here enforcement has ground to a total stop because of the *Grove City* decision or largely because of it. In fact, there are two things that we see that shows why we need title IX restored.

One, women students continue to receive fewer financial aid awards, with smaller amounts on the average than their male counterparts are rewarded. Aid packages present a greater financial burden to the woman. And when it comes down to it, this is one of the things that is so disturbing.

They say that you have to show now that the Federal funds went to a specific program. OK, so we can do that with financial aid. By the way, the small part of all the aid, we estimate that only 4 percent of all aid packages educational is easy to trace or specifically earmarked for a lay person would know is there, because most of it is in the form of block grants.

So in this area it is specific, and then can we now trace it? No. Why? Because—and this is a very ironic part of it—the Department of Education does not require in this area of specific earmarked Federal grants for the colleges or universities to keep data according to gender or race. So here you can tell them that it is earmarked, but when it comes right down to it we are going to have a hard time proving discrimination at a particular university because under the current catch 22 they do not have to keep this data.

At the elementary and secondary level, by the way, after *Grove City* it was believed that *Grove City* would not have a major impact. In fact, the Department of Education said it would not, because under chapter 2 funds they are pretty much block grants and they go throughout the area.

Then DOE reversed their position and said even though they are block grants and hard to trace, you have to be able to trace them and so indeed they have given their very limited interpretation and have made it very, very tough to enforce at the secondary and elementary level.

I could go on. Our data is really shocking in my opinion. What we have here is an unenforceable Act, totally gutted so that our Government can say, yes indeed, we have equal educational opportunity and we do not have any kind of discrimination. Incidentally, you could do this for all the other three major statutes, but you try to enforce it.

As an advocate who has been there in the trenches helping women file complaints, my god, what are we doing? We are shifting the burden to them to try to find where the funds went and were they actually covered.

By the way, it is so hard to have people today come forth. It was hard for them to give us this data because they were afraid that it would cost them their jobs and they do not want to come forth because they think under the current climate, on affirmative action, civil rights and women's rights, that if they come forth and state what is happening to them, they will be targeted as troublemakers, lose their jobs. And we know one thing, this measure will no longer protect them adequately.

Thank you very much.

[The prepared statement of Ms. Smeal and response to questions submitted by Senator Hatch follow:]

TESTIMONY OF THE NATIONAL ORGANIZATION FOR WOMEN

presented by

ELEANOR SMEAL, PRESIDENT

S. 557, THE CIVIL RIGHTS RESTORATION ACT OF 1987

Mr. Chairman, I want to thank you for holding these hearings promptly and for your strong support of the Civil Rights Restoration Act (CRRA) of 1987. I am here today in support of the CRRA of 1987, on behalf of the National Organization for Women, the nation's largest organization dedicated to the elimination of sex discrimination with chapters in some 756 localities in all 50 states.

Also, as a member of the Presidents' Council, representing the leadership of some 37 women's organizations including the American Association of University Women, League of Women Voters, Business and Professional Women, Church Women United, the YWCA, and B'nai B'rith Women, with over 4 million members in some 8000 local units in every Congressional district in this country, I would like to point out that rapid passage of the CRRA is a major plank of the shared agenda of the leading women's organizations of this nation. The Presidents' Council met this morning so that the leadership of these women's organizations could be here today to personally visit members of Congress to convey the urgency felt by their membership for prompt passage of the CRRA and their concern that it not be blocked, yet once again.

The Restoration Principle

We are urging Congress to restore the four statutes of the Civil Rights Restoration Act of 1987 (CRRA) -- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or national origin; Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled persons; and the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age -- to their pre-Grove City scope. The CRRA will simply restore the meaning of the words similar, in each of the statutes, "No person ... shall ... be subjected to discrimination under any ... program or activity receiving federal financial assistance ..." to mean institutional-wide coverage, rather than program specific coverage only.

We are not seeking broader coverage but simply the protection that these statutes offered against race, sex, age, and physical disability discrimination prior to the Grove City v. Bell decision.

My colleagues on this panel and subsequent witnesses will elaborate on the need to restore the institution-wide coverage for the prohibition of federal funding of discrimination on the basis of race, physical disability, and age. I will concentrate my remarks on the need to restore the institution-wide coverage for Title IX. But I do want to emphasize that NOW and the other women's organizations are equally concerned with the need to restore to full coverage each of these historic and crucial civil rights measures. We share the dream of a society of equal opportunity without discrimination or malice toward anyone and we know these historic measures at full strength are important landmarks toward achieving this goal. It's unthinkable that in 1987 we are without this full protection -- that we have gone backwards -- and that federal tax dollars can be used to subsidize institutions that practice discrimination.

The Impact of Title IX

Title IX of the Education Amendments of 1972 helped to create an unprecedented increase in educational opportunities for women and girls. In reviewing the statistics for this testimony I was once again filled with pride in the accomplishments of the women's rights movement, which fought so arduously for both Title IX passage and subsequent enforcement. This Congressional measure which has had a significant positive impact for girls and women in education -- and virtually no negative impact.

As you can see in Tables 1 - 3, in admissions to once almost exclusively male-dominated departments and schools, in degrees awarded by departments and schools in almost all programs connected to academic institutions women have shown a marked increase in opportunities and participation since 1972. It has provided women with advancement into previously male-dominated graduate schools. For instance, the numbers of women enrolled in medical schools rose from 1% in 1972 to 31% in 1984; in law school, from 10% to 38% and in veterinary school, from 12% to 47%. But we have not achieved equity and in virtually every area there remain to this day substantial gaps in opportunity, funding, pay, scholarships, assistantships between men and women in education today.

Title IX increased women's participation in athletics. Before Title IX, there were only 16,000 women participating in inter-collegiate athletics; a decade later, there were 150,000 women participating in inter-collegiate athletics. In 1970-71, there were only 300,000 girls participating in inter-scholastic athletics on the high school level. By 1978-79, the number reached 2 million. The number of scholarships for women has increased from virtually zero to 10,000 in 1984 because of Title IX. The percentage of female intercollegiate athletes has increased from 7% to 36%. The percentage of college athletic budgets allocated for women's activities has increased from 1% to 16%.

There is no question but that Title IX was instrumental in providing women with athletic opportunities. The impressive showing of women in the 1984 Olympics, in large measure, is the result of Title IX. Of the more than 200 U.S. women Olympians, more than 170 received training in a university or college athletic program. As American Olympic basketball star Cheryl Miller put it, "Without Title IX, I wouldn't be here."

In addition to these gains in previously all-male territory, Title IX has helped alleviate other forms of discrimination. It has provided the vehicle for attacking sexual harassment in educational institutions.

Enforcement and Compliance

Later today the National Women's Law Center will release a study on the number of Title IX cases dropped immediately after the Grove City decision by the Office of Civil Rights of the Department of Education, and those subsequently dropped, or placed on hold by OCR. The 63 cases which were immediately dropped indicate a pattern which has continued to this date.

But these cases represent only a small fraction of the compliance and enforcement problems of Title IX today. In the aftermath of Grove City formidable obstacles stand in the way of each of the five mechanisms for enforcement.

Today the climate for enforcing Title IX is extremely hostile. As a result, voluntary compliance is less likely. The word is out that enforcement is weak, that compliance reviews are scant and limited, and that whole departments, such as athletics, are no longer under the jurisdiction of Title IX.

First, much of the enforcement and clout of Title IX was through "audits" or its compliance review process. Before Grove City, OCR had the authorization to audit broadly an entire institution if it were suspected of practicing sex discrimination. Today only specific programs which receive federal funds directly are subject to the few compliance reviews that OCR still conducts.

Second, the complaint process has slowed down. Now, when a complaint is filed in a civil rights office, the program or activity suspected of sex discrimination must first be investigated to determine if it received federal funds. Investigating the track of federal funds to a specific program or activity is a long ordeal. Too often, as result of this process, complaints go on hold or worse yet are never filed. Yes, never filed.

Gene Daniel of the Office of Sex Equity in the Ohio State Department of Education provided NOW the following information describing how this slow down in complaints affects a state. In 1983-4 the Ohio Department received 66 Title IX compliance requests; in 1984-5, 427 compliance requests; in 1985-6, 1,418 such requests. Daniel stated the number of increased requests were partly due to increased visibility of her office; but if there were no need for Title IX the number of requests would diminish. The requests are in three principal areas: (1) parents and communities concerned about sex discrimination in athletics (2) teachers concerned about course assignments, work loads and pay unequal by sex (3) administrators not certain how to comply with Title IX. Yet despite the increased requests in 1985-6, of the 1,418 requests only seven actually resulted in complaints both filed and ruled on by OCR. Six of the seven dealt with athletics. Since athletes are not directly federally funded, OCR ruled against the complainants in all six cases.

Today many women and girls (or their parents) either believe they do not have protection of the law, or don't know they do or don't know if Title IX does cover the violation which affects them. How would an ordinary citizen be able to trace federal funds or know if federal funds are involved? Not knowing or suspecting federal funds are present, many would never know that Title IX could be used to protect them. Not knowing whether or not Title IX covers an activity and believing that if they complained they would probably not have coverage, countless women and girls are intimidated from filing complaints.

The Project on Equal Educational Rights (PEER) of the NOW Legal Defense and Education Fund (of which I am a national board member) has been contacted by numerous women who are fearful of filing a complaint in this permissive, post-Grove City climate. Knowing the coverage has been narrowed and knowing that the process of tracing federal funding is arduous and costly, they believe the risk to their education or job is simply too great.

In other words, the burden of proof that federal funds are involved has shifted to the victim or their representative.

Institutions and their administrators who are adept at their budget processes are shielded by the difficulties facing potential complainants in researching the program's receipt of federal funds. In fact, according to a 1985 PEER study only 4% of the more than $13 billion in federal assistance received by colleges and universities is earmarked for specific programs. Or, in other words, it is easy for a student to know if a Pell Grant is part of the 4% of earmarked federal funds but difficult to determine if a department, or school, or program, or activity received funds from a block grant.

Third, supervision of compliance plans has decreased substantially. Before Grove City, the Department of Education's Office for Civil Rights supervised plans that schools had enacted to fight sex discrimination on their campuses. Subsequent to the ruling, however, monitoring of plans has been stopped except for those few plans which cover specific, federally funded programs. As a result, plans in many colleges or universities were dropped or simply unenforced.

Fourth, administrative law judges instantly drop cases which involve educational institutions that refuse to follow compliance plans issued before Grove City.

And, fifth, federal judges also drop private law suits filed against institutions if the complaint is leveled at a program or activity which does not receive federal funds.

Clearly, the Grove City decision has had a detrimental impact on the goal of eliminating sex discrimination in American educational institutions.

Secondary and Elementary Education

The 1985 PEER Report Card: Update on Women and Girls in

America's Schools -- A State-by-State Survey provides a snapshot of the status of women and girls in secondary and elementary schools. Although we have progressed since 1972, in no area are women or girls at parity. Girls are 35% of interscholastic athletes; women are 17% of the senior high coaches; women are 6.7% of the superintendents; 14% of the assistant superintendents; 6% of the senior high school principals; 10% of the junior high school principals; 26% of the elementary school principals; 13% of the non-traditional vocational education participants.

Initially it was believed that the Grove City decision had greater impact on Title IX enforcement in universities and colleges than in elementary and secondary schools. The bulk of federal funds at this lower level are block grants under Chapter II of the Education Consolidation and Improvement Act of 1981. OCR officials initially maintained these block grants triggered district-wide coverage. In fact, a July 31, 1984 OCR policy memo stated, "The range of programs for which Chapter II funds may be used reaches throughout the school district's programs ... there is a presumption that all of an LEA's (Local Education Agency) programs and activities are subject to OCR's jurisdiction." PEER reported: "Since approximately 95% of all schools receive some Chapter II funds, Title IX coverage in elementary and secondary schools remained largely intact despite Grove City."

But on October 28, 1985 the Department of Education's Civil Rights Reviewing Authority in the matter of Pickens County School District ruled that OCR had no jurisdiction over the school district's physical education program because it did not receive federal funds. Pickens County did receive funds from Chapter I and II funds, the Education for All Handicapped Children Act of 1975, and the Adult Education Act. However, none of these funds was earmarked for the school district's physical education program.

The Pickens County ruling contradicts this [initial OCR] policy by defining Chapter II money as earmarked aid, not general aid. Although a school district can decide to spend Chapter II funds for a range of purposes, including but not limited to those established under the approximately 40 separate federal education programs consolidated into the block grant. But the district must submit an application designating specific programs and use the funds according to that application. "Although the local agency has much discretion in choosing which of the programs under Chapter II it wishes to participate in, once the choice is made, the funds are earmarked and must be used for the designated statutory programs," the D.O.E. Reviewing Authority stated.

The school program that would be defined as a recipient of Chapter II monies -- and therefore according to the Reviewing Authority, covered by Title IX -- should be "a program that has its focus on a function that is closely related to the specific statutory program being funded."

This decision opens the door for school districts to practice wide-scale discrimination in a range of programs, particularly extracurricular activities, honors programs, physical education, and athletics, while still receiving substantial amounts of federal funds through the Chapter II block grants.

Finally, the Department of Education in a December 30 memo reversed its initial policy and said if a complaint is filed against a school receiving Chapter II block grant funds, investigators must first establish a link between the alleged discrimination and federal funds.

The Pickens County decision highlights the need for speedy passage of the Civil Rights Restoration Act. According to this new policy, the only part of the school program covered by Title IX -- and other federal laws banning discrimination based on race, age and disability -- is that portion which can be directly linked to the specified purposes.

For example, if a school district chooses to use some of its Chapter II money for metric education, and that money is used in the mathematics, science and industrial arts programs, those programs would be covered by Title IX. Or in a school that applies for guidance and counseling money, the school's career and vocational counseling program would be covered.

Under Chapter I -- the federal program that provides funds for supplemental educational services for disadvantaged students -- only a school's compensatory education program would be covered. If compensatory education is mainstreamed through all classes, the entire institution may be covered. If compensatory education classes are offered separately (remedial or "enrichment" classes, for example), only those classes would be covered.

At the elementary and secondary school level the only form of federal aid which is presumed to trigger institution-wide coverage is Impact Aid -- aid to school districts located near military bases or other federal installations.

The Need for a Restored Title IX

Student Financial Aid : "The Opportunity Gap"

The need for a stronger Title IX is clear as women students continue to receive fewer financial aid awards with smaller average amounts than their male counterparts, and aid packages present greater financial burdens. A recent study by Mary Moran of the U.S. Department of Education "Student Financial Aid and Women: Equity Dilemma?" published by the Association for the Study of Higher Education in 1986 delineates some of the inequities in education discussed below.

Title IX is not being effectively implemented to eliminate existing discrimination against women in financial aid programs. The U.S. Office for Civil Rights does not include financial assistance as a category for compliance review in its enforcement practices. Schools generally are not required by OCR to maintain data about provision of financial assistance to students by gender, race or national origin, and generally do not keep such records. Thus, compliance review is not possible in most cases, even if OCR wanted to do so. In addition, Moran's study found no court decisions on equitable distribution of financial aid.

The failure to use Title IX to combat financial aid discrimination is particularly ironic in light of the *Grove City* decision. Most observers have assumed that financial aid was one of the few areas which was still covered following the decision. In *Grove City*, the U.S. Supreme Court ruled that Pell Grants, a federal grant program designed to provide aid to financially disadvantaged students, represents aid to a college's own financial aid program and that the financial aid programs are properly regulated under Title IX. Yet despite the Supreme Court's directive to review student aid, OCR guidelines for analysis of financial assistance in determining compliance with

Title IX (and Title VI of the Civil Rights Act of 1964) state that "if an institution does not maintain such data [on financial assistance to students by gender, race, and national origin], the failure to do so is not a violation of Title VI or Title IX."

The failure to enforce Title IX has resulted in gross inequities for women in financial aid programs.

In 1985, according to the College Board, over 80% of student assistance came from the federal government in the form of loans, grants, and work study programs that were made available both directly and indirectly through guarantees. A restoration of educational institution-wide coverage for Title IX would prohibit the flow of billions of federal dollars into schools and colleges practicing sex discrimination.

As women face a wage gap in employment, women also face a financial "aid gap" in education. An analysis by the U.S. Department of Education shows that for every dollar a man receives in the following categories, a woman receives 68 cents in college work study earnings, 73 cents in grants, and 84 cents in loans for low-income undergraduates. (1983) (See Table 4)

This disparity in assistance for men and women is especially critical because women have a greater need for student aid. According to the 1986 report on student financial aid published by the Association for the Study of Higher Education, women are more likely to enroll as independent, unclassified, adult, or part-time students and are more likely to have primary responsibility for child care which results in a higher demand for resources.

Women are twice as likely as men to be independent students on the first year level and have more than twice the unmet need of dependent students. In 1980, American College Testing documents indicate that independents were 66% women to 34% men. (See Table 6) Several studies conclude that the high degree of unmet needs of women result in increased drop-outs, increased part-time enrollments, increased work loads, and the assumption of more loans.

Women outnumber men as part-time students in both numbers of enrollments and in rates of increase. For instance, the U.S. Department of Commerce in 1981 estimated that female students 35 years and over outnumber males nearly 2 to 1. Between 1970 and 1980 the percent increase in the number of part-time undergraduate enrollments for women increased 27.8% and for men by 12.2%. (See Table 7) The problem for these women is, that part-time students must depend more on their own resources, since most university policies focus on full-time students.

On the graduate level, the pattern of unequal aid opportunities persists. The 1986 Moran study also indicates that men hold more research assistantships while women hold more teaching assistantships. The impact is that women take on a higher proportion of undergraduate teaching, while men work more with faculty as colleagues. It is important to note that research assistantships are primarily federally-funded.

The 1985 Summary Report of Doctorate Recipients From United States Universities from the National Research Council indicates that 9330 men received teaching assistantships as compared to 4463 women, which is consistent with the ratio of men and women graduate students. With research assistantships, 9014 men received positions as compared to 3193 women, a rate of about 3 to 1 which is disproportionately in favor of men.

The Report also shows that women doctorate recipients have a greater reliance on personal income for their education than men. The data shows that in all fields self/family support was a primary source for 39.6 % of men and 52.2% of women. In addition, university support was a primary source for 45.7% of men and 33.0% of women.

Financial Aid Trends Hurt Women

While women's enrollments are growing, the types of assistance available which are based on need are diminishing and are being replaced with awards based on merit. In 1984-85 merit grants increased by 39,311 recipients while work/study program recipients based on need declined by 39,670 at public institutions (Stampen 1985).

Aid based on merit is more discretionary and thus more subject to biases. Women with high academic achievements receive fewer and smaller awards than their male counterparts. For instance, the National Merit Scholarship in 1985 was awarded to 2,280 women (or 37.9%) and 3,741 men. Yet, these numbers are a decrease from the 40.2% women received in 1984. Standardized tests like the SAT and GRE also favor men over women. By using these types of measures for granting assistance , women are consistently bypassed for highly desirable scholarships.

Another reason women are losing out on aid opportunities is the way financial need is assessed. The formulas for determining total family contribution often do not account for costs such as child care. In addition, the calculation for "expected earnings" is the same for men and women when Department of Labor statistics unquestionably show that women are paid less than men and women are not as able to rely on savings.

The disparate impact of this discrimination is that parents must contribute more towards their daughters' education than their sons'. Parental aid is a major source of support for 65% of women and 47% of men.

Throughout the array of aid programs including Guaranteed Student Loans, Work Study Programs, Pell Grants, and Supplemental Educational Opportunity Grants (SEOG), women receive less support than comparable men.

The Guaranteed Student Loan Program is the largest federal student aid program; in fiscal year 1985 it distributed $3.7 billion. According to the U.S. Department of Education, women 's participation is not reflective of enrollment rates and is disproportionately low, especially for low-income women. In 1983, low-income women received aid at a rate of 9% while comparable males received aid at a rate of 15.6% based on 1983 figures.

In Work Study Programs, women tend to receive the lower paying jobs. The Cooperative Institutional Research Program has shown that in 1982 "tabulations on students who rank among the top 20 in their high school graduating class indicate that while the percentage of women participating in College Work Study is higher than that of men (16.5% to 13.8%), the average award women receive is less than that of comparable men ($753 to $830). Further, this award covers less of total college costs than for men (13.7% to 14.7%)."

Even in the Pell grant program which is based on need, women receive a lower average award. The Cooperative Institutional Research Program indicates in 1982 that women participate at a higher rate of 64%, but they receive an average award of $880 while men receive an average award of $913. Moreover, women in the top 20 of their high school class tend to receive lower average awards.

In the Supplemental Educational Opportunity Grant Program, low-income women (and women in some other income levels) receive fewer and lower average awards than comparable males. Low-income women attending private, four-year institutions receive fewer awards than their male counterparts by 24.7 % to 35.6% of enrollments.

Three significant observations emanating from this recent study of student financial aid in the United States are that 1) the U.S. Office of Civil Rights enforcement practices do not include student aid in compliance reviews; 2) Title IX coordinators on campuses generally do not have any background in student aid; and 3) no decisions on financial aid from the perspective of equitable distribution of dollars have been handed down by the courts.

Doctorate Recipients

Although women have made much progress in the number of doctorates earned over the last decade, parity has yet to be achieved. According to the National Research Council's 1985 Summary Report, the total number of doctorates awarded in all fields for men was 20,502 and the total for women was 10,699. In other words, women obtained only 34% of PhDs.

It is important to note that the degrees are not distributed equally throughout the major disciplines. The gender gap among Phd recipients varies according to field of study. For instance, in Physical Sciences, men obtained 3817 degrees while women obtained 714 degrees (or 16%). In Engineering, women received 6%

of the doctorates.

In more traditional disciplines for women, such as the Humanities, men obtained 1939 degrees while women received 1489, (or 43%) of the Phds. And in Education, women received 52% of the doctorates, the only area where women earned a majority of the degrees granted. Table 3 details just how much room there is for improvement in the numbers of women in most other fields of study.

A 1985 analysis by Lois Weiss concurs with this data. Weiss states that "women remain severely underrepresented in certain traditionally male areas and that women are even more overrepresented in traditionally female areas than they were ten years ago." At the master's level, 75% of all agriculture degrees were granted to men; 67% of architecture degrees to men; 72% in business management; and 67% in mathematics. Women also continued to predominate in the more traditional areas.

Recently, there has been a decrease in the growth in the proportion of women in the United States receiving Phds. According to the National Research Council, between 1975 and 1983, there has been a consistent annual increase in the percentage of women earning PhDs of at least 1.4%. In 1983-84, this growth slowed to .8% and in 1984-85, the growth slowed by half to .4%.

Employment

The need for a comprehensive Title IX is also undeniable in the area of employment. Significant disparities between men and women employees in education remain. An examination of the data on employed women in academic institutions indicates that there is 1) a consistent wage gap among administrative and faculty positions, 2) a disproportionately high number of tenured men, and 3) a disproportionately low number of women in advanced positions.

In virtually every single job classification, women are paid less than men in educational institutions. A 1984-85 survey conducted by the College and University Personnel Association shows that in the nearly 100 different types of positions in higher education, only 2 areas offer women equal or better median pay. In the remaining classifications, women are paid in a range of 1.4% (Dean of Continuing Education) to a whopping to 83.2% (Chief Planning and Budget Officer) less than men in the same job.

Another survey conducted by the Council for the Advancement and Support of Education in 1986 indicates that there is a 43% difference in women and men's mean salaries for professionals in schools, colleges, and universities. Men are paid $38,817 while the mean salary for comparable women is $27,235. Even when experience, education, and age are the same, women receive lower pay. This is especially important since the same survey in 1982 showed a 37% gap.

In terms of faculty salaries, the Annual Report on the Economic Status of the Profession 1985-86 issued by the American Association of University Professors shows that there is not one single category where women Professors, Associates, Assistants, Instructors, or Lecturers receive on the average equal pay with men.

The next critical factor is the distribution of tenured positions among men and women. According to the 1983 National Research Council Profile of Science, Engineering, and Humanities

Doctorates in the U.S. tenured men far outnumber women. Even in the Humanities, a more traditional field for women, 77.2% (or 34,972) of the men had tenured positions as compared to 51.2% (or 8,074) of the women. In Science and Engineering, men had ten times more tenured positions with 105,717; women had only 10,780.

In addition, women are concentrated at the low status Lecturer and Instructor levels while men predominate in the higher levels of academia. For example, at Harvard University 498 men are full professors as compared to only 27 women or 5%; 108 men are associates as compared to 28 women or only 21%; 203 men are assistants as compared to 81 women or 29%; finally, 21 men are instructors and 9 women or 30%.

At a public institution like Utah State University, the figures are similarly disparate. 179 of the Professors are men and 3 of the Professors are women or just 6%; 158 of the associates are men and 16 are women or 9%; 73 of the assistants are men and 41 are women or 36%; and 11 of the instructors are men and 13 are women or 54%. (See Table 8)

Overall in 1981-82 in the top 25 universities, women were about 6.2% of the full professors in public institutions and only 4.0% of the full professors in private institutions.

Conclusion

The Grove City decision has not only narrowed the coverage of Title IX but has also rendered ineffective the enforcement mechanism of Title IX. The need to trace federal funds to a specific program is reducing both the ability to perform and the incidence of compliance reviews, shifting the burden to victims to trace funds, and reducing the number of complaints filed. Does Congress want to use federal funding as an effective tool to help eliminate sex discrimination in education, or does Congress want to provide to educational institutions a giant loophole through which they can receive federal funds, appear to be complying with a goal of non-discrimination but in actuality continue to discriminate?

Does Congress want to stop subsidizing discrimination or not? This is the central question that should be answered during this CRRA debate.

It is imperative during this hostile climate created by Grove City and the Reagan Administration's non-enforcement, for Congress to send a strong message that federal tax dollars cannot be used to discriminate. Warning signals abound that non-enforcement of Title IX is in effect the rule of Grove City. The passage of the Civil Rights Restoration Act is imperative for saving the enforcement mechanisms for Title IX.

We have made great strides to overcoming discrimination in the past two decades. But there is much evidence that the goal of non-discrimination is not realized. Do not let this setback of 1984 become a major thread for permanently unraveling the fabric of enforcement of our great civil rights statutes.

TABLE 1

ENROLLMENT FOR FIRST PROFESSIONAL DEGREES BY FIELD AND SEX, SELECTED YEARS 1960 THUR 1985

YEAR		MEDICINE		DENTISTRY		OPTOMETRY		OSTEOPATHY		PODIATRY		VET. MEDICINE		LAW		THEOLOGY		ARCHITECTURE*	
		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1960-61	T	30,288		13,580		1,101						3,832		43,695				15,908*	
	W	1,745	5.8	88	0.6	40	3.6					137	3.6	1,651	3.8			780*	4.9
1966-67	T	28,685		11,826		1,671		1,431		678		2,245		46,878		9,949		1,151	
	W	2,099	7.3	180	1.5	37	2.2	32	2.2	9	1.3	183	8.1	2,032	4.3	294	3.0	85	7.4
1968-69	T	35,733		15,542		2,241		1,878		1,108		4,488		64,220		12,369		1,424	
	W	3,129	8.8	171	1.1	53	2.4	54	2.9	8	0.7	351	7.8	3,745	5.8	328	2.7	166	11.7
1971-72	T	43,965		17,433		2,691		2,301		1,267		5,163		94,416		22,789		6,262	
	W	4,730	10.8	355	2.0	86	3.2	79	3.4	15	1.2	593	11.5	9,075	9.6	890	3.9	1,126	18.0
1973-74	T	49,511		19,215		3,360		2,799		1,633		5,528		103,641		21,030		8,577	
	W	7,701	15.6	892	4.6	227	6.8	180	6.5	40	2.4	957	17.3	16,730	16.1	1,543	7.3	1,886	22.0
1975-76	T	55,622		20,517		3,811		3,438		2,105		5,694		113,205		23,960		10,231	
	W	11,386	20.5	1,987	9.7	415	10.9	364	10.6	108	5.1	1,337	23.5	26,403	23.3	2,412	10.1	2,555	25.0
1976-77	T	58,266		21,013		4,033		3,671		2,204		6,571		117,451				7,884	
	W	13,059	22.4	2,349	11.1	542	13.4	472	12.9	157	7.1	1,805	27.5	29,538	29.2			2,198	27.9
1977-78	T	60,039		21,510		4,440		3,926		2,388		6,903		118,557				10,789	
	W	14,218	23.7	2,796	13.0	699	15.7	570	14.8	259	10.8	2,129	30.8	32,538	27.5			3,385	31.4
1978-79	T	62,213		22,179		4,436		4,254		2,498		7,312		119,120				9,273	
	W	15,102	24.3	3,112	14.0	757	17.1	688	16.2	268	10.7	2,471	33.8	36,251	30.4			2,397	25.8
1979-80	T	63,800		22,482		4,500		4,479		2,531		7,007		122,801				7,778	
	W	16,141	25.3	3,482	15.5	868	19.3	775	17.3	305	12.1	2,570	36.7	38,627	31.5			2,649	34.1
1980-81	T	65,497		22,842		4,540		4,940		2,577		8,154		125,397				9,479	
	W	17,204	26.3	3,879	17.0	985	21.7	971	19.7	306	11.9	3,220	29.4	42,122	33.6			3,220	34.0
1981-82	T	66,485		22,621		4,541		5,304		2,584		8,499		127,312					
	W	18,555	25.0	4,227	18.7	1,077	23.7	1,108	20.9	361	14.0	3,576	42.0	44,902	35.3				
1982-83	T	66,886		22,235		4,561		5,822		2,608		8,682		127,828					
	W	19,627	29.3	4,457	20.0	1,173	25.7	1,317	22.6	428	16.4	4,028	46.4	47,083	36.8				
1983-84	T	67,327		21,428		4,539		6,212		2,556		8,816		127,195					
	W	20,635	30.6	4,733	22.1	1,291	28.4	1,526	24.6	476	18.6	4,152	47.1	47,980	37.7				
1984-85	T	67,016		20,588		4,460				2,616		8,917							
	W	21,316	31.8	4,899	23.8	1,391	31.2			569	21.7	4,376	49.1						
1985-86	T	66,585																	
	W	21,650	32.5																

*Includes Environmental Design after 1966.

SOURCE: Digest of Education Statistics, NCES: Review of Legal Education in the United States, 1978, and Fall--1980-84, American Bar Association; Journal of the American Medical Association, Vol. 238, No. 26, December 26, 1977; Vol. 246 No. 25, December 25, 1981; Vol. 248, No. 24, December 24-31, 1982; and Vol. 250, No. 12, September 23, 1983; Annual Report, Dental Education Series, 1975-78, 1980-84, American Dental Association; Fall Enrollments Questionnaire 1974-7 and Annual Statistical Report, 1981, American Association of Colleges of Osteopathic Medicine; and Personal Communications from the Association of American Veterinary Medical Colleges; the American Association of Dental Schools, American Association of Colleges of Podriatic Medicine, Association of American Medi Colleges and the American Association of Colleges of Osteopathic Medicine; Minorities and Women in the Health Fields, Health Resources Administration, 1984

SOURCE: Professional Women and Minorites, Sixth edition, 1986 by Betty M. Vetter and Eleanor L. Babco. Commission on Professionals in Science and Technology

TABLE 2

BACHELOR'S DEGREES CONFERRED BY GENDER IN ALL U.S. COLLEGES AND UNIVERSITIES, 1971-72 AND 1981-82

(*N* in parentheses)[1]

	1971-72				1981-82			
Field of Study	Male		Female		Male		Female	
Agriculture, natural resources	95.0	(12,779)	5.0	(737)	69.0	(14,443)	31.0	(6,586)
Architecture, environmental design	88.0	(5,667)	12.0	(773)	70.0	(6,825)	30.0	(2,903)
Area Studies	48.0	(1,327)	52.0	(1,450)	36.0	(902)	64.0	(1,607)
Biological Sciences	71.0	(26,323)	29.0	(10,970)	55.0	(22,754)	45.0	(18,885)
Business Management	90.0	(110,417)	10.0	(11,592)	61.0	(131,099)	39.0	(84,718)
Communications	65.0	(7,964)	35.0	(4,376)	44.0	(14,917)	56.0	(19,305)
Computer, Information Sciences	86.0	(2,941)	14.0	(461)	65.0	(13,218)	35.0	(7,049)
Education	26.0	(49,531)	74.0	(141,641)	24.0	(24,385)	76.0	(76,678)
Engineering	99.0	(50,638)	1.0	(526)	89.0	(70,899)	11.0	(9,106)
Fine, Applied Arts	40.0	(13,580)	60.0	(20,251)	37.0	(14,819)	63.0	(25,603)
Foreign Languages	25.0	(4,748)	75.0	(14,101)	24.0	(2,394)	76.0	(7,447)
Health Professions	24.0	(7,005)	76.0	(21,606)	16.0	(10,105)	84.0	(53,548)
Home Economics	4.0	(427)	96.0	(11,645)	6.0	(1,016)	94.0	(16,856)
Law	93.0	(470)	7.0	(33)	49.0	(416)	51.0	(430)
Letters	40.0	(29,295)	60.0	(43,958)	39.0	(15,986)	61.0	(24,707)
Library Science	7.0	(66)	93.0	(923)	14.0	(43)	86.0	(264)
Mathematics	61.0	(14,454)	39.0	(9,259)	57.0	(6,593)	43.0	(5,006)
Military Sciences	100.0	(363)		—	93.0	(262)	7.0	(21)
Physical Sciences	85.0	(17,663)	15.0	(3,082)	74.0	(17,866)	26.0	(6,186)
Psychology	54.0	(23,159)	46.0	(19,934)	33.0	(13,623)	67.0	(27,408)
Public Affairs, Services	52.0	(6,606)	48.0	(5,999)	41.0	(13,953)	59.0	(20,475)
Social Sciences	64.0	(101,038)	36.0	(57,266)	55.0	(55,241)	45.0	(44,657)
Theology	72.0	(2,803)	28.0	(1,079)	74.0	(4,461)	26.0	(1,537)
Interdisciplinary Studies	69.0	(11,326)	31.0	(5,021)	48.0	(17,144)	52.0	(18,652)
All fields	56.0	(500,590)	44.0	(386,683)	50.0	(473,364)	50.0	(479,634)

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[1] Data obtained from the National Center for Education Statistics. Data refer to fifty states plus D.C.

SOURCE: Academe, Journal of the American Association of University Professors, November-December, 1985, p.31, Table 2

Table 3

DOCTOR'S DEGREES CONFERRED BY GENDER IN ALL U.S. COLLEGES AND UNIVERSITIES, 1971-72 AND 1981-82

(*N* in parentheses)[1]

Field of Study	1971-72				1981-82			
	Male		Female		Male		Female	
Agriculture, Natural Resources	97.0	(945)	3.0	(26)	86.0	(925)	14.0	(154)
Architecture, Environment Design	86.0	(43)	14.0	(7)	73.0	(58)	27.0	(22)
Area Studies	82.0	(126)	18.0	(28)	56.0	(55)	44.0	(43)
Biological Sciences	83.0	(3,031)	17.0	(622)	71.0	(2,654)	29.0	(1,089)
Business Management	98.0	(882)	2.0	(20)	82.0	(705)	18.0	(152)
Communications	86.0	(96)	14.0	(15)	68.0	(136)	32.0	(64)
Computer, Information Sciences	93.0	(155)	7.0	(12)	92.0	(230)	8.0	(21)
Education	76.0	(5,381)	24.0	(1,660)	51.0	(3,949)	49.0	(3,727)
Engineering	99.0	(3,649)	1.0	(22)	95.0	(2,496)	5.0	(140)
Fine, Applied Arts	75.0	(428)	25.0	(144)	57.0	(380)	43.0	(290)
Foreign Languages	63.0	(526)	37.0	(315)	45.0	(242)	55.0	(294)
Health Professions	82.0	(362)	18.0	(80)	54.0	(503)	46.0	(422)
Home Economics	29.0	(30)	71.0	(74)	30.0	(73)	70.0	(174)
Law	98.0	(39)	2.0	(1)	91.0	(20)	9.0	(2)
Letters	73.0	(1,886)	27.0	(703)	54.0	(915)	46.0	(766)
Library Science	56.0	(36)	44.0	(28)	37.0	(31)	63.0	(53)
Mathematics	92.0	(1,039)	8.0	(89)	86.0	(587)	14.0	(94)
Military Sciences		—		—		—		—
Physical Sciences	93.0	(3,830)	7.0	(273)	86.0	(2,635)	14.0	(451)
Psychology	75.0	(1,414)	25.0	(467)	55.0	(1,518)	45.0	(1,262)
Public Affairs, Services	78.0	(165)	22.0	(46)	57.0	(245)	43.0	(184)
Social Sciences	85.0	(3,481)	15.0	(598)	73.0	(2,240)	27.0	(825)
Theology	95.0	(420)	5.0	(21)	92.0	(1,185)	8.0	(103)
Interdisciplinary Studies	85.0	(126)	15.0	(22)	62.0	(242)	38.0	(151)
All fields	84.0	(28,090)	16.0	(5,273)	68.0	(22,224)	32.0	(10,483)

[1] Data obtained from the National Center for Education Statistics. Data refer to fifty states plus D.C.

SOURCE: Academe, Journal of the American Association of University Professors, November-December, 1985, p.31, Table 2

Table 4

DIFFERENCES IN TOTAL AVERAGE GRANTS, LOANS, AND EARNINGS,
BY TYPE OF INSTITUTION AND SEX: 1980-81 AND 1981-82.*

	Total Grant Amounts*		Total Loan Amounts*		Total Earnings*	
	1980-81	1981-82	1980-81	1981-82	1980-81	1981-82
Public Two-Year						
Male	$1142	$1262	$754	$1408	$711	$784
Female	1016	947	824	1298	544	502
Public Four-Year						
Male	1930	2034	1329	1528	1087	1237
Female	1575	1448	864	1129	681	798
Private Four-Year						
Male	2323	2613	1871	2338	804	1192
Female	3022	3081	1352	1871	671	927
Vocational*						
Male	1303	1481	2137	1301	812	534
Female	1264	1025	1362	1176	848	481
All Institutions						
Male	1950	2218	1587	1766	873	1014
Female	1688	1699	1132	1492	659	894

* The base for average dollar amounts is all low-income (less than $12,000 annually) 1980 high school seniors enrolled in postsecondary education in 1980-81 and 1981-82.
* Average amount per individual.
* Includes all vocational and technical institutions as well as proprietary institutions.

Source: U.S. Department of Education 1983.

Source: Moran, Mary. Student Financial Aid and Women: Equity Dilemma?
ASHE-ERIC Higher Education Report No. 5. Washington D.C.:
Association for the Study of Higher Education, 1986.

Table [illegible]

PERCENTAGE OF STUDENT AID APPLICANTS WITH NEED
ACCORDING TO CLASS LEVEL, BY SEX: 1974-75 AND 1979-80

	1974-75			1979-80		
	N	[illegible]	%	N	[illegible]	%
Dependent		[illegible]			[illegible]	
Freshman	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sophomore	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Junior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Senior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Graduate student	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Other or unknown	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TOTALS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Self-Supporting		[illegible]			[illegible]	
Freshman	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sophomore	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Junior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Senior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Graduate student	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Other or unknown	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TOTALS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
All Applicants		[illegible]			[illegible]	
Freshman	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sophomore	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Junior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Senior	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Graduate student	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Other or unknown	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TOTALS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

* Based on all applicants with need.

Source: American College Testing [illegible].

Source: Moran, Mary. *Student Financial Aid and Women: Equity Dilemma?* ASHE-ERIC Higher Education Report No.5, Washington D.C.: Association for the Study of Higher Education, 1986.

Table 6

DISTRIBUTION OF UNMET NEED BY STATUS OF DEPENDENCY AND SEX: 1982-83 AND 1983-84

	Dependent		Independent with Children		Independent without Children	
	No. of Students	Average Need per Recipient	No. of Students	Average Need per Recipient	No. of Students	Average Need per Recipient
1982-83						
Male	4524	$2126	937	$4005	3289	$2114
Female	4527	2099	2158	4168	2648	2215
1983-84						
Male	5091	2176	1025	4541	3788	2308
Female	5645	2112	2293	4163	2909	2257

Source: Fenske, Hearn, and Curry 1985, p. 14.

SOURCE: Moran, Mary. Student Financial Aid and Women: Equity Dilemma?
ASHE-ERIC Higher Education Report No. 5. Washington D.C.:
Association for the Study of Higher Education, 1986.

Table 7

COMPOSITION OF THE INCREASE IN ENROLLMENTS, BY SEX, ENROLLMENT STATUS, AND TYPE OF INSTITUTIONS: 1970-1980.

	Percent of Increase			Number of Increase
Women				
Full-time/ Four-year	23.6%			652,000
Full-time/ Two-year	11.1			307,000
Part-time/ Four-year	10.7			298,000
Part-time/ Two-year	17.1			474,000
		62.5%		
Full-time/ Graduate	7.6			209,000
Part-time/ Graduate	7.3			
		14.9%		
TOTAL			77.4%	
Men				
Full-time/ Four-year	4.8%			134,000
Full-time/ Two-year	.5			13,000
Part-time/ Four-year	5.7			157,000
Part-time/ Two-year	6.5			181,000
Full-time/ Graduate	2.5			68,000
Part-time/ Graduate	2.6			72,000
TOTAL			22.6%	
ENTIRE TOTAL			100.0%	

Source: U.S. Department of Commerce, Bureau of the Census 1981.

Source: Moran, Mary. *Student Financial Aid and Women: Equity Dilemma?* ASHE-ERIC Higher Education Report No. 5. Washington D.C. : Association for the Study of Higher Education, 1986.

Table 8

The Annual Report on the Economic Status of the Profession 1985-86

Source: AAUP, v.72 n. 2
Key: PR - Professor, AO - Associate Professor, AI - Assistant Professor, IN - Instructor

	# Men				# Women			
	PR	AO	AI	IN	PR	AO	AI	IN
Alabama								
Auburn U.	304	281	251	44	16	40	73	57
Alabama A&M U.	34	51	54	16	14	26	32	18
California								
Stanford	495	96	119	-	17	24	35	-
UCLA	761	210	181	-	70	52	94	-
Colorado								
Colorado St. U.	431	225	139	9	13	39	54	7
U. of CO/Boulder	446	191	129	8	21	44	52	5
Connecticut								
Yale	380	92	137	8	18	35	75	3
U. of CT	484	263	132	8	52	75	78	6
Florida								
Stetson U.	56	26	26	3	6	10	11	7
U. of FL	838	611	428	25	47	115	149	49
Hawaii								
U. of HI (Manoa)	374	215	152	13	34	50	117	41
Illinois								
Northwestern	387	170	125	4	25	48	35	1
U. of Chicago	421	145	112	26	21	38	27	8
U. of IL -Chicago	307	304	212	10	51	90	121	17
U. of IL -Urbana	935	442	317	3	59	81	91	1

Table 8 (continued)

Indiana								
Purdue	542	344	288	39	39	22	58	32
Indiana U.	564	257	156	4	50	85	28	1
Iowa								
Drake	105	49	25	6	4	16	23	7
Iowa State	478	267	247	73	34	67	107	91
U. of Iowa	432	230	159	9	36	68	92	5
Maine								
Bowdoin	37	20	23	6	1	4	16	2
U. of Maine-Orono	144	115	79	11	3	30	53	15
Maryland								
Johns Hopkins	257	73	85	7	19	21	32	6
U. of MD.	415	343	170	39	44	92	84	56
Massachusetts								
Boston U.	306	212	176	18	40	74	105	24
Harvard	498	108	203	21	27	28	81	9
MIT	530	184	139	31	25	27	34	2
Tufts	110	109	94	2	12	40	43	1
UMass-Amherst	588	275	139	11	53	80	70	4
Mississippi								
MS. State	336	207	134	37	23	33	36	26
U. of MS.	121	98	74	18	9	12	42	30
New Hampshire								
Dartmouth	163	47	59	10	3	27	44	6
U. of NH	173	173	88	4	2	59	47	-
Ohio								
Kent State	195	176	144	3	10	53	81	13
Miami U.	220	183	117	62	16	34	58	37

Table 8 (continued)

Ohio								
Ohio State	683	449	344	33	34	110	144	59
Rhode Island								
Brown	266	55	74	-	18	25	36	1
U. of RI	284	145	95	1	23	53	61	6
South Carolina								
Clemson	237	176	103	14	13	23	51	12
U. of SC	306	229	160	20	13	90	73	40
Utah								
U. of Utah	373	183	98	15	24	57	53	22
Utah State	179	158	73	11	3	16	41	13
Vermont								
Middlebury	48	16	32	9	4	4	19	6
U. of VT	152	124	68	2	7	45	42	7
Washington								
Gonzaga	36	43	22	1	-	9	19	-
U. of WA	661	343	198	6	66	89	85	-
WA. State	274	217	128	2	15	49	73	10

QUESTIONS FOR MS. SMEAL

1) Has your organization ever taken the position that failure to provide abortion services is a form of sex discrimination? I am speaking as to policy, not the law under current statutes and regulations.

2) Consider the example of a clinic that is owned by a university and administers and provides services under that university's school health program. Under S. 557, would that clinic be able to deny access to women?

3) If the clinic mentioned in question (2) were owned and administered by a private hospital, such as the St. Louis Regional hospital cited by Mr. Wilson, but had a contractual arrangement with a nearby teaching hospital such that medical students and residents provide much of the indigent care to the general public in the region, was such a hospital covered by Title IX prior to Grove City College v. Bell? Please cite case law in support of this assertion.

Would St. Louis Regional or a similarly situated hospital be covered under Title IX if S. 557 were enacted?

4) Under S. 557, would that hospital be forced to provide abortion services to its indigent patients?

5) The body of Title IX regulations were examined in six days of hearings in 1975 to determine whether the regulations as they were written are consistent with Title IX. Given this specific action and the failure of Congress at that time to propose or pass resolutions disapproving such regulations, do you believe the regulations mandating abortion coverage in health, medical and leave policies under Title IX, i.e. 34 CFR 106.40(b) (4) and (5) and 34 CFR 106.57(c) and (d), have been ratified by Congress?

6) Would an executive branch action to repeal the Title IX regulations relating to abortion at this time be subject to a legal challenge?

7) Should inclusion of the language found on page 2, lines 13 through 16, be interpreted as codifying, approving or sanctioning all existing federal regulations, rules and opinions interpreting the four laws addressed in S. 557?

8) Does the language on page 2, lines 13-16 of S. 557, codify 34 CFR 106.40(b) (4) and (5) and 34 CFR 106.57(c) and (d)?

National Organization for Women, Inc.
1401 New York Avenue, N.W., Suite 800 • Washington, D.C. 20005-2102 • (202) 347-2279

April 21, 1987

The Honorable Edward M. Kennedy
Chairman, Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

I have reviewed carefully the questions posed to me in writing by Senator Orrin Hatch as followup to my testimony regarding S. 557, the Civil Rights Restoration Act.

As part of my review I also have consulted with other witnesses who are concerned in particular with Title IX, and who were given the same, or substantially the same questions as I received.

The end result of that review is that NOW's answers to questions 2 through 8 posed to me would be the same as the answers to questions 4 through 10 submitted by Marcia D. Greenberger, managing attorney for the National Women's Law Center. Therefore, I would refer Senator Hatch and the Committee to Ms. Greenberger's answers submitted on April 17, 1987.

As for the remaining question submitted to me, question 1, to the best of my knowledge, NOW has not to date taken a policy position that the failure to provide abortion services is a form of sex discrimination. We do believe, however, that the right to obtain an abortion is Constitutionally protected under the right to privacy.

Speaking for NOW, I look forward to the expeditious passage of S. 557 by the Senate and the full Congress as a major step down the road to full educational equality for women and girls.

Sincerely,

Eleanor Smeal

Eleanor Smeal
President

EL:hb

The **Chairman**. Thank you very much.

Edward Kennedy, Jr., executive director, Facing the Challenge.

Mr. **Kennedy**. Thank you, Mr. Chairman and members of the Committee. Thank you very much for giving me the opportunity to speak to you today on S. 557, the Civil Rights Restoration Act of 1987.

I am submitting a full copy of my testimony for the record.

I am speaking today in behalf of my organization, Facing the Challenge, and 65 national organizations which are dedicated to securing equal civil rights for people with disabilities. Today, I represent people who have all different kinds of disabilities: people who are visually impaired, deaf, physically disabled, and mentally retarded. Many of you may say that the deafness is different from blindness which is different from somebody who has epilepsy, etc. But the reason why I am here today is because people with disabilities have come together from a common history, which has been the history of segregation, alienation, pity, and fear. The reason why we are here today is because our rights have been eroded. Our common goals are the goals of acceptance and the goals of integration, and these goals have been eroded by the *Grove City* case and this is the reason why we are here today.

The passage of section 504 in 1973 was an historic event for all disabled Americans. The idea that society should protect, isolate and care for people with disabilities gave way to the belief that the greatest good for society and people with disabilities lay in the fullest integration possible. The idea of full participation in society and the promise of equal citizenship was given with section 504. That represented a big, big change in terms of disability public policy.

The right to live in a society in which it is unlawful to discriminate is being eroded by the *Grove City* decision. Historically, the inferior economic and social status of disabled people was accepted as inevitable consequence of their disability. Section 504's antidiscrimination language demonstrated that Congress understood the fact that many of the problems disabled face are not inevitable but, instead, are the result of outdated policies and practices.

I have maintained and maintain today that it is not a physical or mental condition that constitutes the greatest disability in our society. There are outdated programs and policies which constitute the greatest handicap that disabled people face today.

Since the enactment of section 504, American society has been transformed. Disabled people today refuse to be warehoused by outdated practices, shut away in institutions and nursing homes. What section 504 did is make disabled people more visible and viable in the community, knocking down a lot of the barriers which people face in employment, in education, and other areas. The more people are visible and viable in the community, the more these attitudinal barriers are knocked down. The reason why we need a Federal law, is because of these incredible prejudices attitudes that still face people.

I know, because before I lost my leg, I had the same kind of attitudes toward disabled people that I am working so hard to dispel today. I thought it was the worst thing in the world. The fact is that to be disabled in our society is considered a tragedy.

Having a disability is not a tragedy. What is a tragedy today, is that as a result of *Grove City,* we have outdated practices and procedures that are perpetuated. Because of disability, people are made to feel inferior and isolated. The fact is people want to have an education, they want to be able to take part, they want to contribute, and these civil rights are being eroded; We want the same things out of life as everyone else.

I am speaking on behalf of 65 national disability organizations when I say today that the *Grove City* decision hopelessly obstructs this path, the path of full integration and acceptance of all people.

Let me emphasize that there is no doubt that *Grove City* decision fully applies to section 504 and that it extends beyond education. It is astounding to me that some people still think that the negative effects of *Grove City* will be cured by narrow legislation which is addresses only Title IX or only educational programs.

The fact is that this narrow interpretation that the Supreme Court had in terms of *Grove City* is being applied every single day in education, in employment, and in health issues, and that is why—also you have to point out at the same time, the same day that the *Grove City* case was handed down, it issued Consolidated Rail Corporation v. Darrone, which was a 504 case, and the Court explicitly held that it covered employment, regardless of the purpose of the Federal funds. The Supreme Court held that same day of the broad interpretation of the original intent of the legislation.

Right now, section 504 is the only statute, the only legal recourse that anybody with a disability can take as far as an antidiscrimination statute. So it is more than just education. These policies, the erosion of these policies have been seen in a lot of different areas.

Employers, like other members of the general public, hold the same stereotypes and prejudices about people which impede their ability to objectively evaluate the qualifications of applicants and workers with disabilities. As I said a moment ago, it is these same attitudinal barriers that really are the greatest impediment to people becoming full and productive members in our society.

You know, I have talked to hundreds of people with disabilities across this country who have been denied jobs for which they were qualified because of the antiquated and archaic, medieval medical standards, attitudes and stereotyping. We have an educational system today that is telling children that because they have a disability they are going to be limited.

Children are not being integrated as much as they should in a normalized school atmosphere. There are thousands of people literally prisoners in their own homes because of lack of public transportation, and this is unacceptable I think. It is society which imprisons them.

The general message that Congress is saying to the disabled community is you are unwanted in our society. You are making it unnecessarily hard to achieve employment and to achieve an education. It is unacceptable for a nation that is celebrating its 200th anniversary of its Constitution to be continuing to subsidize programs which discriminate against any minority of citizens.

People with disabilities do not want charity, they want equal opportunity. I can on about the different cases about people who have been affected by the narrow interpretation of the law. I will not bother you with that.

The **Chairman**. Well, we will put that in the record.

Mr. **Kennedy**. You have heard it all before.

The **Chairman**. We have heard it before.

Mr. **Kennedy**. But I can only stress, in the one final point, that really *Grove City* is really constituting the biggest handicap as far as the disabled people in America are concerned to the full integration and equal opportunities in our society.

Thank you.

[The prepared statement of Mr. Kennedy follows:]

UNITED STATES SENATE

COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARING ON S. 557

THE CIVIL RIGHTS RESTORATION ACT OF 1987

MARCH 19, 1987

TESTIMONY SUBMITTED

BY

TED KENNEDY, JR.

ON BEHALF OF:

Alexander Graham Bell Association for the Deaf
American Academy of Child and Adolescent Psychiatry
American Association of University Affiliated Programs
American Association on Mental Deficiency
American Council of the Blind
American Diabetes Association
American Disabled for Accessible Public Transportation
American Foundation for the Blind
American Occupational Therapy Association
American Physical Therapy Association
American Speech-Language-Hearing Association
ACLD,An Association for Children and Adults with Learning Disabilities
Association on Handicapped Student Service Programs
    in Postsecondary Education
Association for Retarded Citizens/US
Association for the Education of Rehabilitation Facility Personnel
Center for Law and Social Policy
Child Welfare League of America
Conference of Educational Administrators Serving the Deaf
Cornelia deLange Syndrome Foundation
Council for Exceptional Children
Council of State Administrators of Vocational Rehabilitation
Cystic Fibrosis Foundation
Disability Rights Center
Disability Rights Education and Defense Fund
Disabled American Veterans
Disabled But Able to Vote
Epilepsy Foundation of America
Facing the Challenge
Federation for Children with Special Needs
Goodwill Industries of America
Handicapped Organized Women
International Association of Psychosocial Rehabilitation Services
Mental Health Law Project
National Alliance for the Mentally Ill
National Association of the Deaf
National Association of Developmental Disabilities Councils
National Association for Parents of the Visually Impaired
National Association of Private Residential Facilities
    for the Mentally Retarded
National Association of Protection and Advocacy Systems
National Association of State Mental Health Program Directors
National Association of State Mental Retardation Program Directors
National Center for Law and the Deaf
National Council on Independent Living
National Council on Rehabilitation Education
National Down Syndrome Congress
National Easter Seal Society

National Head Injury Foundation
National [illegible]
National Mental Health Association
National Multiple Sclerosis Society
National Neurofibromatosis Foundation
National Organization for Rare Disorders
National Organization on Disability
National Recreation and Park Association
National Rehabilitation Association
National Society for Children and Adults with Autism
National Spinal Cord Injury Association
Paralyzed Veterans of America
People First International
[illegible]
Spina Bifida Association of America
Tourette Syndrome Association
[illegible]
United Cerebral Palsy Associations
World Institute on Disability

Mr. Chairman and Members of the Committee: Thank you for the opportunity to speak before the Committee today on S. 557, the Civil Rights Restoration Act of 1987. I am speaking on behalf of my organization, Facing the Challenge and sixty-five national organizations which are dedicated to securing equal opportunity for the 36 million Americans who have disabilities.

Today I represent people who have all types of disabilities -- people who are visually impaired, deaf, physically disabled, mentally retarded and people who have hidden disabilities such as epilepsy, cancer, head injury and mental illness. No matter what our disability is, we all have experienced some form of discrimination and we all depend on Section 504 to provide basic protections to guarantee our civil rights in federally assisted and conducted programs.

The passage of Section 504 in 1973 was a historic event for all disabled Americans. For the first time Congress recognized that people with disabilities, like minorities and woman, were subject to discrimination and were entitled to basic civil rights protections -- the promise of equal citizenship.

This represented a major shift in disability public policy and a fundamental challenge to traditional notions about disability. No longer would the invisibility of disabled people be taken for granted in this country and no longer would a life of charity be the only option for people with disabilities.

Historically the inferior economic and social status of disabled people was accepted as an inevitable consequence of their disability. Section 504's anti-discrimination language demonstrates Congress' understanding that many of the problems disabled people face are not inevitable but are instead the result of discriminatory policies and practices.

Since the enactment of Section 504 American society has been transformed. Disabled people are no longer "out of sight, out of mind", shut away in institutions, nursing homes and segregated schools and programs. Because of Section 504, people with disabilities are beginning to take their place in the mainstream of American life. The gains are impressive -- but we are only just beginning -- the path to equality is long.

We are here today because we believe that the Supreme Court's Grove City College decision hopelessly obstructs this path. Let me emphasize that there is no doubt that the Grove City decision fully applies to Section 504 and that it extends beyond education.

It is astounding to me that some still claim that the negative effects of Grove City will be cured by narrow legislation which addresses only Title IX or only education programs. We must remember that the same day the Court issued the Grove City decision, it also issued Consolidated Rail Corporation v. Darrone. This was a Section 504 case involving employment discrimination by a railway corporation. The Court explicitly held that its narrow interpretation of "program and activity" in Grove City applied with full force to Section 504.

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people which impede their ability to objectively evaluate the qualifications of applicants or workers with disabilities. Stereotypes and prejudices rather than handicaps themselves are the most potent barriers to equal employment opportunity. Often the image of what disabled people "should do" or "can do" has no basis in reality.

In a recent survey of 23 local government jurisdictions the following medical standards were revealed:

All cities and counties impose restrictions of various kinds regarding the hiring of persons with past or present epileptic conditions...

None of the jurisdictions was willing to hire blind applicants...

The written standard for one jurisdiction prohibits the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job...

Another county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of this impairment...

Many jurisdictions exclude applicants with a history of cancer.

I have talked to hundreds of disabled people who have been denied jobs for which they were qualified, because of antiquated and archaic medical standards and medieval attitudes and stereotyping, people who are denied admission to education programs -- pre-school to postsecondary because "someone" had determined that they could not be educated and thousands of people who are literally prisoners in their homes because there is no accessible transportation -- and perhaps the most significant of all are those who have been silenced --- thousands who accept as their fate the inaccessibility and discrimination which denies them the right to move in society -- to contribute -- to belong.

People with disabilities prefer equal opportunity to special treatment and charity. Consider for example the woman who has had epilepsy since 1965, who was denied employment by a large corporation solely on the basis that the company had a blanket policy preventing anyone with epilepsy from being hired for that particular job;

Or, the young woman who is visually impaired and who was accepted into dental school but was denied auxiliary aids . She was forced to drop out. She then reenrolled in a dental school that provided her with an accommodation. She is now completing her studies and is on the Dean's List;

Or, the group home which was denied zoning permits because the local zoning commission did not want people who are mentally retarded living in a certain part of town;

Or the man who was denied a job in a drug treatment center because he was deaf.

Prior to the Grove City decision each of these cases would have been investigated by the appropriate administrative agency or would have been litigated in court. But instead, each case was either dropped by the administrative agency or dismissed by the courts.

This does not begin to tell the story. The Congressional mandate which provided broad anti-discrimination protection to 36 million Americans with disabilities is being destroyed by the courts and the federal agencies charged with its enforcement because of the Grove City decision.

Court and agency decisions such as the ones I mentioned require the disabled individual or the regulatory agency to trace the federal dollar to the discriminatory act. Federal agencies now spend taxpayers' dollars following the flow of federal dollars instead of doing what the law requires them to do -- investigate complaints of discrimination.

Is this what this Committee and Congress intended when you passed Section 504 in 1973?

In the last four years I have traveled across this country talking to people with disabilities and parents of disabled children about their lives. I am here to report that, contrary to what the Reagan Administration believes, we do not live in a discrimination-free society and contrary to what Mr. Reynolds stated during the hearing in the 99th Congress, we are not at the "brink of victory" in securing integration and equal opportunity for all Americans with disabilities.

Disabled people continue to be the most unemployed, underemployed, and the poorest citizens in this nation. The cost of employment discrimination is tremendous to disabled individuals and to society at large.

Now is the time for Congress to act. For three years opponents of this bill have clouded the issues. The 36 million disabled Americans I speak for today cannot wait any longer. We are not asking Congress to extend any protections. We are only asking Congress to stop the practice of federal dollars being used to support discrimination.

A decade of great progress for disabled Americans has come to a halt and the promise of equal citizenship extended by Congress in 1973 is still unfulfilled and will continue to be stripped away by the courts and federal agencies if the Civil Rights Restoration Act is not passed by this Congress.

The CHAIRMAN. Thank you very much.

Kermit Phelps.

Mr. PHELPS. I am Dr. Kermit Phelps, chairman of the Board of Directors of the American Association of Retired Persons.

I want to thank you for this opportunity to express AARP's strong support for the most important piece of civil rights legislation before this Congress, the Civil Rights Restoration Act.

AARP is, of course, vitally interested in increasing the effectiveness of the Age Discrimination Act of 1975, one of four major civil right laws weakened by the decision of the Supreme Court in the *Grove City College* v. *Bell* case in 1984.

For reasons I will discuss in a minute, the Aid Discrimination Act of 1975 has historically been the least effective of the civil rights laws and the older Americans have paid the price. However, AARP is equally committed to eradicating all forms of discrimination, whether they be based on sex, race, religion, national origin, disability, age or other general groups.

The diversity of AARP's membership of 25 million people above the age of 50 is representative of the heterogeneity of American society. AARP counts among its members people of many races, people whose ancestors or are themselves from many different countries and heritages, people with disabilities and people with many different religions. More than half of AARP's members are women.

The rights of all Americans to be free from discrimination have been weakened by the *Grove City* decision. Discrimination has no place in a democratic society and it is especially offensive when practiced by those who accept Federal funds for any reason.

The Age Discrimination Act was modeled after title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color or national origin in Federal funded programs and I use the term "programs" advisedly here.

The Age Discrimination Act prohibits discrimination on the basis of age in these same programs. I emphasize that, although the law was passed in response to what the Civil Rights Commission in the late 1970's found to be widespread discrimination against persons older than 65, it contains no age limitation at all. It protects all persons from age discrimination, although it does allow for differentiations based on age in certain narrow circumstances.

For a number of reasons, the Age Discrimination Act has been unable to fulfill its promise. First, except for very general regulations issued by the Department of Health and Human Services, there have been no regulations issued to implement or enforce this law. To our knowledge, there has been no public education, there have been no investigations, there have been no efforts by the Federal agencies to assess whether Federal funds are being misused in this manner. A series of proposed regulations in early 1984 was almost immediately mooted by the *Grove City* decision.

Second, no enforcement mechanism has ever been established. Because there is no private right of action under the Age Discrimination Act, enforcement is completely dependent upon the Federal agencies receiving complaints, investigating and taking steps to cut off the Federal funds received by those who discriminate. However, the lack of any regulations means there is effectively no place for a victim to file a complaint; there is no one to investigate a complaint; and there is no clear process by which Federal funds can be cut off.

Finally, and perhaps most important, the *Grove City* decision's narrow interpretation of the term "program" makes it virtually impossible to meaningfully enforce this law. Age discrimination, more so than other forms of discrimination, is subtle and often hard to detect. Often, it is not simply an affirmative decision to deny a benefit to older persons but a passive failure to make that benefit available to older persons. For example, a city using its Federal mass transit funds to run its subway system may decide to curtail non-rush hour bus service or not to purchase step-up buses, both of which older persons may be heavily reliant upon. A hospital using Federal money to run its emergency room may refuse to perform certain types of cardiac surgery on persons above a certain age, or it may curtail at-home health care services upon which home-bound older persons are heavily reliant. A university using its Federal moneys only in its undergraduate programs may refuse to admit older persons to the medical school because it believes they will have fewer years to practice after graduation. A State rehabilitation service could give low priority to or refuse to train persons above a certain age, reasoning that those persons might be harder to employ or have fewer future working years. The list goes on.

There are those who say this legislation should be limited to educational institutions because the *Grove City* case arose in that context. But, as I have made clear, the effect of this decision is far greater than simply on educational institutions, and certainly this administration has interpreted the decision as applying not only to title IX and not only to educational institutions, but to all four of the civil rights laws affected and to all recipients of Federal funds.

There are also those that would like to use this very important piece of legislation to accomplish other goals. Unfortunately, the experiences of the 98th and 99th Congresses have shown us that the best bill and the only hope for passage is a clean and simple restoration bill.

The AARP supports S. 557 as introduced on February 19, 1987, and its companion bill in the House of Representatives, H.R. 1214, with no amendments. I urge you to speedily pass this legislation and restore the real full meaning and effectiveness of those civil rights laws that are the finest expression of America's freedom of opportunity and democracy.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Larson.

Mr. LARSON. Thank you, Mr. Chairman.

My name is Richard Larson and I am the vice president for legal programs of the Mexican American Legal Defense and Educational Fund. Antonia Hernandez, who is the president and General Counsel of MALDEF, intended to be here today and wanted to be here but was unable to; and so I am testifying in her stead and I thank you for the opportunity.

At the outset, Mr. Chairman, I want to thank you for introducing this legislation and to echo Senator Weicker's compliments with regard to moving so expeditiously in holding this hearing. I hope, as you said when you introduced the legislation, that Congress will act expeditiously in enacting this legislation.

I would also like to thank Senator Weicker for being a coauthor and cosponsor of this legislation. I also would like to point out, as Senator Weicker well knows, that he has experience in this area of nullifying Supreme Court decisions which do not comport with the intent of Congress. Four months after the *Grove City* decision, the Supreme Court rendered its decision in a case called *Smith* v. *Robinson,* which took away the rights of handicapped children which Congress had previously accorded to handicapped children.

Senator Weicker, through his subcommittee in the 99th Congress, was instrumental in getting the Senate to pass legislation nullifying *Smith* v. *Robinson* within one year. Now, true, it took another year before it was enacted, but it was enacted.

Here we are, more than 3 years after *Grove City* and we have not yet nullified that decision. It must be nullified.

Mr. Chairman, I have submitted a prepared statement. I will not read it. I will summarize several points having to do with, first, the need for this legislation; and second, the need for this legislation to be enacted without amendment.

First, the legislation is badly needed. For example, had the *Grove City* interpretation been the interpretation that had been followed by HEW under title VI in 1964 and forward for the 20 years between 1964 and the *Grove City* decision, today there would be little desegregation of our public schools, today there would be little desegregation of higher education, today there would be little reform in the discrimination that had been practiced by hospitals against blacks, Hispanics and other minorities.

We cannot go back, we cannot return to that era. We must put *Grove City* out of existence, it must be nullified. The problems today because of *Grove City* have been summarized by other members of the panel.

The recipients, the institutional recipients of Federal funding are claiming that there is no pinpoint program or activity Federal funding where discrimination is alleged. Despite discrimination in the institutions, they are saying you cannot correct our discrimination.

The Federal enforcement agencies are no longer civil rights experts; they are becoming auditors and accountants. When they receive a charge of discrimination, they simply try to trace the Federal dollars, even though a discrimination may be apparent.

The victims of discrimination, of course, are without any remedy, and this is one of the most horrible things. Finally, the result of all of this is that Federal taxpayers' money is supporting illegal discrimination.

Second, this legislation does need to be considered and move quickly without divisive amendments. Similar legislation was introduced in the 98th Congress and in the 99th Congress, and now this historic 100th Congress must enact this legislation.

In the 98th Congress, majorities of both Houses supported the legislation and yet it was stopped by a filibuster. In the 99th Congress, what stopped it was divisive amendments. That cannot be allowed to happen in this 100th Congress.

From MALDEF's perspective, and I am sure from the perspective of all of us on this panel, this legislation could be stronger. MALDEF, for example, would like, with regard to title VI, stronger remedies, we would also like mandatory enforcement. There are a number of things that we would like to see in this legislation, but this is not a piece of legislation that is a vehicle for extraneous baggage.

This legislation is simply to restore the law to where it was pre-*Grove City*. So we will not support any amendments, even though we might think they would be good.

Finally, I think that this Committee, the Senate and the Congress as a whole need to send a message to the entire Nation, particularly these days with our increasingly racially hostile climate. That message should be that basic civil rights must be respected, and I believe that would be the effect of the enactment of the Civil Rights Restoration Act.

I urge expeditious consideration and enactment. Thank you.

[The prepared statement of Mr. Larson and responses to questions submitted by Senator Kennedy follow:]

STATEMENT

ON BEHALF OF THE

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND ("MALDEF")

BY

ANTONIA HERNANDEZ
PRESIDENT AND GENERAL COUNSEL

AND

E. RICHARD LARSON
VICE PRESIDENT FOR LEGAL PROGRAMS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

IN SUPPORT OF

S557
THE CIVIL RIGHTS RESTORATION ACT OF 1987

100th CONGRESS
1st SESSION
MARCH 19, 1987

STATEMENT
ON BEHALF OF THE
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")

Mr. Chairman and members of the Committee, thank you for providing the Mexican American Legal Defense and Educational Fund ("MALDEF") with the opportunity to testify on S.557, titled the Civil Rights Restoration Act of 1987. This is legislation which MALDEF believes to be extraordinarily important, and which must be quickly enacted.

Before turning to the substance of my testimony, I initially wish to address two preliminary matters.

First, I apologize that Antonia Hernandez, MALDEF's President and General Counsel, was not able to be here today because of prior commitments. She asked me to testify in her stead, and I am pleased to do so. I am E. Richard Larson, MALDEF's Vice President for Legal Programs.

Second, I want to thank all fifty-one Senators who are sponsoring the Civil Rights Restoration Act of 1987. I also wish particularly to thank you, Mr. Chairman, not only for introducing this important legislation, but also for holding this hearing within one month of your introduction of this legislation. Like you, Mr. Chairman, I urge your colleagues' "assistance in ensuring its expeditious consideration" and passage. 133 Cong. Rec. S2251 (daily ed. Feb. 19, 1987) (remarks of Senator Kennedy). This legislation simply must be quickly enacted to put a stop to discrimination by federally financed institutions.

In the substance of my testimony, I will address hereafter two interrelated matters: first, the need for this legislation in general; and, second, the need for this legislation to be passed quickly and without controversial amendments.

1. The Legislation Is Badly Needed

The genesis of this legislation, as everyone in Congress knows, dates back more than three years to Grove City College v. Bell, 465 U.S. 555 (1984), a case in which the Supreme Court unfortunately rejected the position urged by MALDEF as amicus curiae, and adopted instead the extraordinarily narrow and seemingly untenable position urged by the Department of Justice. According to the Court, the nondiscrimination requirements of Title IX of the Education Amendments of 1972 were not intended to cover as a whole those institutions which receive federal financial assistance but instead were intended to cover only the pin-point "program or activity" which is the specific subject of federal financial assistance.

This devastating decision in Grove City College was conspicuously devoid of analysis of Congress' actual and broader intent, and it was totally devoid of any reference to the regulations of and the broad institutional enforcement by the many federal agencies responsible for interpreting and enforcing Title IX and related nondiscrimination statutes.

[illegible]

[illegible]

[illegible]

> [illegible]

*** Federally funded institutions (colleges and universities, public school systems, hospitals, parks and recreation departments, and so on) charged with discrimination or even confronted with discrimination in a compliance review have not examined their challenged practices but instead have superficially denied any real or potential illegality on pin-point "program or activity" procedural grounds.

*** The federal enforcement agencies, concerned primarily with documenting the trail of federal dollars, have repeatedly found themselves in the incongruous position of looking into the face of ugly discrimination practiced by federally funded institutions, but of doing nothing about it.

*** Worst of all is the fact that the victims of this discrimination, who ordinarily are protected by no other federal civil rights laws, are not having their claims of discrimination remedied, investigated, or often even heard. These victims of discrimination instead are simply told that there's nothing that can be done. Meanwhile, the federal dollars of all taxpayers continue to flow to discriminatory institutions.

This depressing state of affairs obviously needs to be corrected. And that is precisely what S.557 is designed to do. This version of the Civil Rights Restoration Act, as clearly set forth in S.557, would overturn the pin-point "program or activity" limitation announced in Grove City College v. Bell, 465 U.S 555 (1984); and it would make clear that the definition of "program or activity" in Title VI, in Title IX, in Section 504, and in the ADA covers all of the operations of an institution which is extended federal financial assistance.

The foregoing is all that S.557 seeks to and will accomplish. It does no more and no less. It does not change the nature of the discrimination that is prohibited; it does not alter standards of proof or burdens of proof; it does not affect the methods of private enforcement; and, apart from defining the contours of the "program or activity" of a covered entity, it does not change who is covered by the statutes, and it does not change regulatory definitions or exemptions.

S.557 is a clean bill which should be considered and passed expeditiously.

2. The Legislation Should Be Passed Quickly and Without Controversial Amendments

It of course is not unusual for the Supreme Court to render a decision in which the Court misinterprets, or even seems to avoid altogether, the intent of Congress. And it similarly is not unusual for Congress to nullify an erroneous Supreme Court interpretation by restoring Congress' original intent through new legislation.

This is precisely what occurred, for example, with regard to a Supreme Court decision involving handicapped children which the Court rendered four months after Grove City College v. Bell, 465 U.S. 555 (1984). In this later decision, Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court erroneously concluded that, by enacting the remedially comprehensive Education for All Handicapped Children Act of 1975, Congress had implicitly repealed all overlapping rights and remedies earlier provided by Congress to handicapped students. The 99th Congress, in response to this erroneous interpretation of original congressional intent, thereafter nullified the Supreme Court's decision through the enactment of the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (Aug. 5, 1986).

Within an even longer time frame, however, the Supreme Court's similarly erroneous and and even more devastating decision in Grove City College v. Bell, 465 U.S. 555 (1984), has not yet been corrected. Congress' failure to do so is no less than a travesty, a great injustice.

This is not to say that heroic efforts to restore President Kennedy's "simply justice" have not been made, for they have been made. Legislation to nullify the Supreme Court's pin-point "program or activity" limitation was introduced and debated in the 98th Congress; MALDEF testified in support of that legislation; but it was not enacted. Similar legislation was introduced and debated in the 99th Congress; MALDEF again testified in support; and again it was not enacted. This legislation, in sum, has had a most unhappy and even sordid history.

With this new legislation (in revised, squeaky-clean form) now ready to be considered by this historic 100th Congress, it simply must be passed.

Previous efforts to accomplish the result sought by this legislation have failed in part, as Congress is well aware, because of controversial and divisive encumbering amendments having nothing to do with nullifying the Supreme Court's erroneous pin-point "program or activity" limitation. Although we certainly do not denigrate the motives or concerns of those lobbyists and Members of Congress who in the past have proposed the encumbering amendments, the Civil Rights Restoration Act with its "simple justice" purpose and needed enactment is not at all the appropriate vehicle for miscellanous (however important) amendments which would again ground to a halt this monumentally important legislation.

There are, for example, a number of amendments that MALDEF would like to see added to this legislation so as to broaden the coverage of Title VI, to expand the remedies available under Title VI, and to enhance the enforcement of Title VI -- amendments which we at MALDEF believe are necessary to hasten the elimination of illegal discrimination based on race and/or national origin. But because such amendments no doubt would be in some quarters somewhat controversial or divisive, we have not pushed for and will not now support any such amendments. This same common-sense approach should be taken, we believe, by all persons, organizations and Members of Congress who profess a belief in civil rights. Special-interest concerns should be addressed through other legislative vehicles, also in other forums, and also on another day.

Yes, on another day. Today, racial incidents and bigotry appear to be increasing in this otherwise great Nation. While it is true that enactment of the Civil Rights Restoration Act of 1987 will not stamp out racially-motivated violence in Howard Beach, Queens, or elsewhere, and will not stamp out racial intolerance in Forsyth County, Georgia, and elsewhere, nevertheless Congress' expeditious passage of this clean and needed legislation will send an important message across these United States: that discrimination is illegal; and that our civil rights laws will be enforced, as Congress intended them to be.

I urge, again, that S.557 be expediously considered and passed. And I thank you for the opportunity to testify on behalf of MALDEF.

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MALDEF

April 22, 1987

Senator Edward M. Kennedy, Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: Questions Submitted to E. Richard Larson on S.557,
The Civil Rights Restoration Act of 1987

Dear Senator Kennedy:

Subsequent to my testimony before your Committee on Labor and Human Resources on March 19, 1987, I received a series of questions from several Senators on your Committee. Similar questions were submitted to Elaine Jones and to several other witnesses. In this letter, I shall respond to the questions which were submitted to me.

Question 1. Please explain the meaning of the phrase, "and each other entity," which is found, for example, on page three, paragraph (1)(B) of S.557?

Answer. The phrase, "and each other entity," means any state or local government unit which is not a government "department" or "agency." Examples include a school board and an office of human resources.

Question 2. What is the correct interpretation of subsection (4) on, for example, page four which refers to "any combination comprised of two or more of the entities described in paragraph (1), (2), or (3)"?

Answer. The language means what it says. Coverage is not limited just to the entities described in each of paragraphs (1), (2), and (3), but instead applies to any combination of two or more such entities.

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Question 3. Would you give an example of the type of entities covered by subsection 4?

Answer. Examples of a combination of such entities may include regional transportation authorities, metropolitan planning commissions, and combined vocational education districts.

Question 4. Please explain the statutory basis prior to the decision by the Supreme Court in Grove City, which authorized treatment of organizations principally engaged in the business of providing education, health care, housing, social services, or parks and recreation in a manner different from other organizations?

Answer. Prior to Grove City, the relevant nondiscrimination provisions were interpreted by the courts and by enforcement agencies as providing corporate-wide or organization-wide coverage. S.557 simply recognizes that corporate-wide or organization-wide nondiscrimination is especially important for businesses or organizations engaged in public functions such as providing education, health care, housing, social services, or parks and recreation.

Question 5. Would you please explain what is meant by the phrase "as a whole," which can be found on page three in subsection (3)(a)(i)? What kind of aid constitutes aid to a corporation or organizations "as a whole"?

Answer. Aid provided to a business or an organization "as a whole" includes unrestricted funds benefiting the entire corporation or organization. An example of such aid is the federal government's financial bailout of the Chrysler Corporation.

Question 6. If a church operates a school in its building and the school receives federal education aid, is the church covered as a whole, in addition to the federally-assisted education program, under S.557?

Answer. As a general matter, church-operated elementary and secondary schools do not receive federal financial assistance. However, to the extent that a church-operated school does receive federal education aid, as hypothesized in the question, only the school would be covered, not the church.

Question 7. How would your answer to the previous question change, if at all, if some of the federal education aid for the school was used to fund some operating costs related to the education program in the church's executive office?

Answer. The answer is the same as the answer to question 6. The answer might be different, however, if a church-operated school itself did receive direct federal aid and if a significant amount of the aid were diverted to the church's executive office. Such a diversion should not occur, in any event, in order to avoid violations of the First Amendment's establishment clause.

Question 8. (a) Under your interpretation of the law prior to the Grove City decision, did the grant by a federal agency of a license, for example, for television or radio broadcasting, subject the broadcaster to coverage under any of these four statutes? (b) Does S.557 change your interpretation in any way?

Answer. The answer to both (a) and (b) is the same: no. Such a license has not been interpreted as, and is not, federal financial assistance.

Question 9. (a) Under your interpretation of the law prior to the Grove City decision, did the grant of a federal tax credit subject to coverage, in any way, the entity receiving the tax credit? (b) Does S.557 change your understanding in any way?

Answer. The answer to both (a) and (b) is again the same: no.

Question 10. Under S.557, is a medical doctor incorporated as a professional "corporation" included within the definition of "an entire corporation . . . which is principally engaged in the business of providing . . . health care. . ." if the doctor's patients pay him or her with Medicare or Medicaid benefits?

Answer. A medical doctor -- whether as a sole proprietorship, a partnership, or a professional corporation -- who receives payment through Medicare Part A or through Medicaid was covered prior to Grove City and is currently covered. No change in this interpretation is effected by S.557.

Question 11. Please explain who is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

Answer. Under the law prior to Grove City as well as under current law, the relevant nondiscrimination provisions do not apply to ultimate beneficiaries such as students benefiting from federally guaranteed education loans. No change in this interpretation is caused by S.557.

Question 12. In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S.557 excluded from coverage under the four statutes addressed in the legislation?

Answer. Yes.

* * * * *

I hope, Senator Kennedy, that the foregoing answers are sufficiently responsive to the questions submitted by your colleagues.

More importantly, I again urge on behalf of MALDEF the expeditious consideration and passage of this important legislation by this historic 100th Congress.

Sincerely,

E. Richard Larson

E. Richard Larson
Vice President for Legal Programs

ERL:cg

The CHAIRMAN. Thank you very much.

In its excellent testimony, this panel has demonstrated to this Committee in a very compelling way what the implications of the *Grove City* decision have been in each of the areas of coverage: discrimination against women, discrimination against the physically challenged or the disabled, discrimination against the elderly, or discrimination on the basis of race. For each and every one of these areas we have had very, very compelling testimony about the changed condition, and I think the case has been very well made about the importance of restoring the broad interpretation of the statutes that was held for so many years by Republican and Democratic administrations alike.

I have no questions.

Senator Hatch.

Senator HATCH. Thank you, Senator.

I might just make a couple of points. I know my staff said that during my opening remarks that I had said that we want to overrule title IX. Well, that is a mistake. We would like to overrule *Grove City* and restore title IX to the position of prominence that it deserves, no question about that.

But I think I need to make a point following a number of the statements made here today, especially with regard to a no-amendment strategy.

It seems to me, unless this particular legislation cannot be voluntarily or mutually changed, the only real reason for amendments is to try to clarify and make the legislative process a better process.

It makes a mockery of deliberative approaches here with the variety of viewpoints that we have if we do not at least consider amendments to a bill that in and of itself is ambiguous, difficult to understand, and may create all kinds of lost rights in our society. It will in my opinion and in the opinion of many, many others who have studied its legal ramifications, under the guise that it is restoring rights, this bill will in actuality take away rights. By doing so it could make a mockery of the legislative process if we do not try to clarify it so that we do not get into another very similar approach on the other side of the coin with regard to title IX and the other three antidiscrimination statutes as well.

The goal of any amendment process, of course, is to clean up ambiguities and to do it so that we can get everybody to support the bill.

Now, I know if all we wanted to do was overturn the *Grove City* case—and, Ms. Smeal, you make a very good case on that—that literally there is a broad consensus in our society to overturn *Grove City* and strengthen title IX. I support that and I think most people in the Congress do support that, regardless of whether they are for or against this bill. So that really is not the issue. The issue is how can we best do that, can we do it through this bill which in the eyes of a number of us, and I might add many constitutional authorities, will take away rights and will involve the Federal Government thus ignoring the time-honored battle between those who believe in State and local governments and their abilities to operate and those who believe that only the Federal Government should do everything.

Frankly, that is one of the biggest points. If we have no amendments to clear up the ambiguities in this bill, then I think that would be frustrating the goal that even you have stated here today as witnesses try and get this so there is a general consensus in our society.

I do not know if we can ever reach that, because there is and there has been this time-honored battle between those who love the Federal Government and who think only the Federal Government can solve all problems and those of us who think that the Federal Government sometimes causes problems and does not solve them, and that State and local governments have some rights and so do small businesses and so do business institutions and so do religious institutions and so do nonprofit corporations, all of whom would be affected disastrously, in my opinion and the opinion of quite a few others affected by this type of legislation.

As I mentioned earlier, I am interested in this morning gaining a better understanding of the extent of coverage provided under this bill, S. 557. Mr. Hooks, clause 1(a) of the bill states that the term "program or activity" means, among other things, an instrumentality of the State or local government.

Now, if a State receives Federal block grant funds—and we have a number of bills that do what involve Federal block grant funds—does this language mean that all divisions within the State, bureaus and offices within the State, that all of those are subject to Federal regulation and review? Is that what this bill means?

Mr. HOOKS. Senator Hatch, my answer has to be rather vague because we are going to have an expert panel to testify on the——

Senator HATCH. Well, what is your belief and understanding? You have worked on this bill now for years, ever since *Grove City* and are one of the principal spokesmen for it. Just give us what you feel and we will be happy to listen to the experts as well.

Mr. HOOKS. I am saying that my answer is very simple, that I do not subscribe to the theory that all of the possible things that have been said that could happen will happen. We have many years of experience under the title before *Grove City* and we did not have all of the extreme things happen. I do not think they would happen now.

Senator HATCH. But you do not know whether they——

Mr. HOOKS. I am not able to relate specifically in a way that I would be willing to go on record on every possible variation, except to say that the years of experience of administration of the four titles that we are concerned with never produced the kind of effects that come if we passed this Act that we are talking about today.

Senator HATCH. OK. Clause 1(b) of the same bill states, "The program or activity also can be interpreted to include each other entity to which assistance is extended." Now, does that mean in your opinion that if a State receives Federal block grant moneys and one of its agencies uses these funds to contract with the local private research business, that this small business would be subject to Federal regulation and review? Do you believe it would?

Mr. HOOKS. Again, Senator, I am not able to respond to that in the sense that you ask it because it is a rather general question, and I think all these questions come up specifically.

My general answer is if a small business receives Federal funds that they should be subject to Federal regulation.

I recall some years ago when we were discussing the Civil Rights Act that the same kind of questions were raised about will small businesses be put out of business if they have to serve black people who want to eat in the restaurant; will hotels be forced to close because black folk have to use them. In the Voting Rights Act, we had the same kinds of questions that are being raised by you today—would we put the small counties out of business; would the Federal Government take over everything.

I just do not think that all of these "what if" situations that you have raised in your opening statement and that you have made in other statements across the three years we have been debating this are really going to happen. And when you ask me a question, specifically, that is rather general, I am not prepared to give a general answer to a general question except to say that I do not believe that that would be an undue burden placed on a small business because of some tenuous connection.

On the other hand, if that small business has a direct connection and receives support or subsidies from the Federal Government, or are bidding on contracts from the Federal Government, I think they ought to be covered. That is my answer.

Senator HATCH. So you think they ought to be covered, even if it is just one dollar that comes into that business.

Mr. HOOKS. Well, I have used the term a "tenuous connection", and I mean by that that I do not believe that any Federal enforcement would be ridiculous. And I think if you are talking about fifty cents or a dollar in the Title to start with——

Senator HATCH. It is one hundred dollars.

Mr. HOOKS [continuing]. title IX, where we dealt with it, voluntary compliance was sought at all times, and Federal enforcement agencies went to extreme lengths to get compliance before they dealt with cutoff of funds. I think that same kind of enforcement regulatory machinery will be in effect.

Senator HATCH. You can see why I am concerned, because you see, that has been the problem, that those who have sponsored these bills in the past have had a very difficult time explaining why the Federal Government will not be coming into everybody's lives as a result of the language in this bill.

Now, they have made an effort with this new bill to try and resolve some of the problem. But, like Senator Humphrey, you say you do not want an amendment approach, and yet we know that under the Carter administration they enacted regulations applicable to title IX that would require an abortion to be treated the same as any other medical practice or procedure, even at a place like Notre Dame. And that became a very serious problem to many people, and of course, is one of the reasons that slowed the bill down.

If we do not resolve that, through the amendment process, then it seems to me it is by necessity going to be a problem.

Let me turn to you, Mr. Larson. You are representing a legal foundation.

Senator WEICKER. I wonder if the Senator would yield.

Senator HATCH. Sure.

Senator WEICKER. Just so we keep the record straight here in response to some of these questions, it is my understanding that for State and local Governments, only the department or agency which receives the aid is covered, and where an entity of State or local Government receives Federal aid and distributes it to another department or agency, both entities are covered.

Senator HATCH. That is right.

Senator WEICKER. I think that is the response, in other words, that the Senator requires. For private corporations, if the Federal aid is extended to the corporation as a whole, or if the corporation provides public service such as social services, education or housing, the entire corporation is covered.

Senator HATCH. It will be covered.

Senator WEICKER. If Federal aid is extended to only one plant or geographically separate facility, only that plant is covered.

Now, I would suggest that there is no way that we are going to interpret here in this committee every, single hypothetical which the Senator throws out.

Senator HATCH. No; nor am I going to do that, because we would be here for at least three or four months.

Senator WEICKER. That, I think, we leave to the courts or to practice.

What we can do is to generally set forth the law and the policy to be pursued, and I would hope that again, in the questioning of all of these witnesses, myself included, to those who take a different position than I, I am not here to go and search out what they think a particular section will involve or how it will be interpreted, et cetera. We have an awful lot of witnesses today to listen to.

Senator HATCH. But I am a little bit interested in the language of the bill, regardless of what you say, Senator, and that goes to if a small business receives some indirect funding. And I am not just talking about direct; I am talking direct or indirect. And are they covered—or some nonprofit corporation, or some church that has definitely held, sincerely held religious beliefs. You can go on and on.

Let me ask another question. Let me turn to you, Mr. Larson, since you represent a legal foundation. Are you an attorney yourself?

Mr. LARSON. I represent the Mexican American Legal Defense and Educational Fund; and yes, I am an attorney.

Senator HATCH. OK. Well, using the definition found in the bill that "program or activity" would apply to each entity to which the assistance is extended, would a local pharmacy be covered because a State administers reimbursements for prescriptions purchased at the pharmacy by individuals who receive Medicaid?

Mr. LARSON. Under current regulations, an ultimate beneficiary is not covered, and you know that, Senator Hatch.

Senator HATCH. I know that, but what about under this bill?

Mr. LARSON. It would not be covered.

Senator HATCH. You do not think it would be covered under this bill?

Mr. LARSON. No. Senator Hatch, this "parade of horrors" which you are going through, it has already been pointed out that this is what was done to try to block title IX. The "parade of horrors" never came about.

I also heard you with regard to the Voting Rights Act extension amendments back in 1982 talk about another "parade of horrors" with regard to the amendment of section 2. That "parade of horrors" has not happened.

Senator HATCH. Oh, yes, it did. I had all of you come in and say that at-large voting districts would not be done away with. That is all that has been attacked since section 2 of the Voting Rights. Do not tell me that. And that was my major consideration. And that is what happens on this bill. You come in and say, "Oh, this does not apply. This is not going to affect us." And then we get it into law, and then everybody in America becomes subject to the Federal Government.

Let me ask another question. I will take your answer on that——

The CHAIRMAN. The Senator's time has expired.

Senator HATCH. Well, then, I will wait for the next round.

The CHAIRMAN. Yes, you can wait for the next time.

I am going to ask consent that each of the witnesses be able to supply their answers to any of the questions.

Senator HATCH. That will be fine, too.

The CHAIRMAN. As Mr. Hooks knows so well, title VI was in effect for 25 years, and these kinds of horror stories that can be dreamed up by Senators' staffs did not materialize. We have all been through this before, Mr. Hooks, so do not be aroused. [Laughter.]

Senator HATCH. I think I have asked enough questions by staff. I will have some more, too.

The CHAIRMAN. There has been an objection filed to this committee meeting after the 2-hour rule. So let us just set out the ground rules for consideration of this legislation.

Obviously, a "no amendment" strategy does not apply to clarifications of any of the language in the bill and ways in which it is related to the *Grove City* decision. That has been the position of the proponents since this bill was first introduced in 1984. What it does apply to is extraneous items, and that is the way that we have expressed it.

We now know that the gauntlet is being laid down now for our committee. There is an objection to being able to sit through the normal course of the hearings. I believe this is the first objection that has been filed in this Congress to a committee meeting to try and give opportunities for witnesses to testify.

I want to say that this chairman is not going to put up with long, extraneous, dilatory tactics by any member of this committee——

Senator HATCH. Well, let me——

The CHAIRMAN [continuing]. I have the floor and I just want to make that very clear at the outset.

Senator HATCH. May I—when you are finished, I would like to say something.

The CHAIRMAN. So that is the way that we will proceed.

Senator HATCH. Will you yield?

The CHAIRMAN. The Senator from—I will yield for a brief comment.

Senator HATCH. Will you yield for just a brief comment.

The CHAIRMAN. For a brief question.

Senator HATCH. Let me just say this——

The CHAIRMAN. I yield for a brief question.

Senator HATCH. No. Let me make a brief——

The CHAIRMAN. The Senator from Illinois.

Senator HATCH. Will you yield to me for a brief comment?

The CHAIRMAN. The Senator from Illinois is recognized.

Senator HATCH. Would you yield, Senator Simon?

Senator SIMON. I will yield 30 seconds to the Senator from Utah.

Senator HATCH. I appreciate that. And by the way, I am not the one who has objected to the committee meeting. I would not do that. And I am going to try and get it cleared, because I think this is important.

Number two, I think it is important that we ask some of these questions. You see, my experience with this bill is they have tried to ram it through every year without answering these very important questions. And I think if this is dilatory tactics, then Senator, you are going to learn a lot about what really they are in the future if we cannot ask the questions that have to be asked on this bill.

Now——

Senator SIMON. I am going to have to reclaim my time here.

Senator HATCH. I would be happy to yield.

The CHAIRMAN. Now would you yield me 30 seconds?

Senator SIMON. Yes.

The CHAIRMAN. The point that I would make here is that no one has to fear—no one has to fear—and anybody who is listening to this or watching it, no one has to fear unless you are going to discriminate. Let us recognize that. If you are not going to discriminate, you have got nothing to fear. That is what we are talking about, is using Federal money, American taxpayers' money, to discriminate. And if you do not discriminate, you have nothing to fear, no matter how you try to misstate, misinterpret what this legislation is about.

Senator HATCH. Could I——

The CHAIRMAN. The Senator from Illinois.

Senator HATCH. Senator Simon, could I have just 30 seconds?

Senator SIMON. I am going to have to reclaim my time. Otherwise——

Senator HATCH. Let me just say, that was not true.

Senator SIMON. Mr. Chairman, the time is mine here.

Senator HATCH. Go ahead.

Senator SIMON. First I want to comment all the witnesses and particularly take note of the fact that Mr. Kennedy is here, who ought to be proud of his father, but let me add, his father ought to be very proud of his son and his son's testimony here.

The CHAIRMAN. Thank you very much.

Senator SIMON. You used the phrase, describing disabled people, that the message goes to them, "You are unwanted." That same phrase applies to Hispanics, senior citizens, women, blacks.

The most significant thing we can do, and as important as this bill is, is to see that, for example, the disabled, who have the highest rate of unemployment among the employable people, have job opportunities.

I am pleased to say that today, I have introduced legislation that some of the members of this committee are cosponsoring, that would for the first time guarantee a job opportunity to every American. It is a step that we have to take, and the sooner we take it, the better off this country is going to be.

On the immediate legislation before us, let me just add this comment. We passed, and I had the honor of being the chief sponsor in the House 3 years ago, we passed this legislation 375 to I think it was 28 or 32—overwhelmingly. I remember being on Hodding Carter's—if I may have the attention of the gentleman from Utah—I remember being on Hodding Carter's television program with the gentleman from Utah, and he said, "What we want to do is to go back one day before Grove City." I think that is what this legislation does, very simply. And we ought to do it.

There is no question we are denying opportunities to Americans who ought to have that opportunity by our failure to have teeth in this legislation.

Because of the time constraint that we are on because of the objection, Mr. Chairman, I will not ask any questions, but I just want to——

Senator HATCH. Well, I have been informed there are no objections. We have checked with the floor, and I do not think anybody has raised an objection. So, Senator, take your time—certainly, not on our side. Now, if there has been, they have told us that there has not been. So I do not know anything more to say.

Senator SIMON. Well, I am getting a mixed message.

The CHAIRMAN. Well, it has just been lifted.

Senator HATCH. No——

The CHAIRMAN. The objection has been lifted.

Senator HATCH. Well, if that is so, then I got it lifted for you, so let us go. But let us be able to ask questions of these so-called experts, whoever they are. I want you to ask them, and I want to be able to ask them. If they know the answers, fine; if they do not know the answers, that is fine, too.

The CHAIRMAN. The Senator from Illinois.

Senator SIMON. Mr. Chairman, I see that, even if I wanted to ask questions, that red light is on, so I will not at this point. But I simply want to commend the witnesses for taking a stand; it is a very important stand for this country.

The CHAIRMAN. The Senator from Connecticut.

Senator WEICKER. I also want to thank the witnesses. I have no questions for the witnesses.

I would say to my good friend from Utah, I gathered before this hearing and during the hearing and now that I hear everybody talking, that it is going to be "hard ball" time. Thank God.

Senator HATCH. I am afraid it is.

Senator WEICKER. Because quite frankly, for six years, it was "no ball" time around here as far as this legislation was concerned. [Laughter.]

Senator HATCH. It came up twice, Senator.

Senator WEICKER. I do not understand "no ball" but I sure as hell understand "hard ball", believe me. And that is just fine, because that is what it is going to require—and I might add, not just on the committee, but hopefully, the American public—just all the groups that you represent. Tell them to vote against the Senators and Congressmen who want to go ahead and block this. That is the way the message comes across.

You know just as well as I do, when it was a matter of civil rights legislation, I had everybody sort of pointing the finger saying, "A few Southern Senators are preventing this legislation." Well, I know the discrimination was just as rampant in my State of Connecticut as it was down South. And when the Nation—the Nation—wanted civil rights legislation, its conscience pricked by Dr. King, it got it; it rolled through the Senate, rule 22 notwithstanding.

So there is nothing in the way of either Committee rules or Senate rules that can block this legislation if the Nation wants it. I hope the Nation speaks out and speaks out loudly on the issue.

The CHAIRMAN. The Senator from Washington.

Senator ADAMS. Thank you, Mr. Chairman.

I do not have questions for the panel. I want to thank you all for being here this morning and state that I stand with Senator Weicker on this, as with yesterday, and if it is going to be a fight, why, we are in it.

The CHAIRMAN. The Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

I regret I had to absent myself for a while. I had to take part in a press conference.

I really wish I had been here. I imagine it was very interesting.

Senator WEICKER. It is going to be more interesting now that you are here. [Laughter.]

Senator HATCH. I agree with that.

Senator HUMPHREY. I feel like I am joining a party after all the refreshments have been consumed, and there is not much left.

But let us see, whom shall I pick on? It is such a wonderful panel, I do not know where to begin. Indeed singling out one might be considered a form of discrimination.

Mr. LARSON. You can pick on the white male. [Laughter.]

The CHAIRMAN. We will be in order.

Senator HUMPHREY. I do regret that I have not had the grounding that I missed here in the last few minutes, but let me plunge in in any case.

Mr. Larson—I do not even know with whom you are affiliated———

Mr. LARSON. I represent the Mexican American Legal Defense and Educational Fund.

Senator HUMPHREY. OK. Did the *Grove City* decision in any way overturn title VII of the Civil Rights Act of 1964? That is the provision which prohibits discrimination on the basis of race, sex, nationality, religion, in all forms of employment.

Mr. LARSON. Senator Humphrey, title VII, which covers only employment—does not cover education; does not apply to the delivery of Government services; does not apply to the delivery of health services—it is only an employment statute, and it has nothing to do with federally funded and supported discrimination by recipients of Federal funds.

Senator HUMPHREY. You must be a lawyer.

Mr. LARSON. Yes, sir.

Senator **Humphrey**. You make the most of your answers, don't you?

My point is that this charge, explicit or implicit as the case may be, that *Grove City* overturned the civil rights statute on a massive scale and that now we need something called the "Civil Rights Restoration Act", is really quite false; that indeed, most of the civil rights statute is untouched by the *Grove City* decision such that these broad suggestions and statements that without the passage of this Act which is now before the committee, that the cause of civil rights in this country has been grievously and massively wounded is really quite untrue.

How about——

Mr. **Larson**. If you are still with me, Senator Humphrey, I sincerely disagree. Title VI was one of the backbones of the 1964 Civil Rights Act.

Senator **Humphrey**. All right. But you do not disagree with my point that all of these other civil rights laws are untouched by *Grove City*.

Mr. **Larson**. Title IX is certainly affected; 504 is affected, and the Age Discrimination Act is affected.

Ms. **Smeal**. Yes. What are you talking about?

Mr. **Larson**. These are the major nondiscrimination statutes governing discrimination by federally funded institutions.

Senator **Humphrey**. OK. I am not going to argue with a lawyer, because I am not a lawyer, but I think my point is valid that the suggestion that our civil rights laws have been massively wounded by *Grove City* is really quite untrue, and I was just trying to put that into focus.

Ms. **Smeal**. We all object to that, of course.

Senator **Humphrey**. Let me address a question to Ms. Smeal.

Do you agree with my analysis, Ms. Smeal, that if this bill were passed in the form in which it is now before the committee, that hospitals which do not now perform abortions would be required to perform abortions if, for instance, even one of their medical students was receiving some form of Federal assistance?

Ms. **Smeal**. I do not agree with your analysis on the subject of abortion at all.

Senator **Humphrey**. You do not agree with—I am not talking about the broad issue of abortion; I am talking about the explicit case that I just presented.

Ms. **Smeal**. I think that this statute is restoring a title IX——

Senator **Humphrey**. Can you answer my question, please?

Ms. **Smeal**. Yes. I am saying I do not agree with you.

Senator **Humphrey**. So you are saying that I misinterpret the bill——

Ms. **Smeal**. Yes.

Senator **Humphrey** [continuing]. That in the case of a hospital which today chooses not to perform abortions, for whatever reason—and I suppose they would be moral reasons—that in the case of such a hospital, if this bill were to become law, and one of the students at that hospital was receiving Federal assistance of some kind, that that hospital would not then be required to perform abortions under this law?

Ms. **Smeal**. As I say, I disagree with that analysis totally.

Senator **Humphrey**. Well, in that case, we have a very fundamental disagreement. I think you are mistaken, and I think that you are mistaken will come out as these deliberations proceed.

Ms. **Smeal**. I think that you are trying to make an issue here that is not relevant to the entire statute and to the Civil Rights Act, to Title IX, and that you are trying to make a substantive change.

Senator **Humphrey**. Well, you are entitled to your opinion, I guess, as I am. But I think I am right.

The **Chairman**. The Senator's time has expired.

Senator **Humphrey**. All right. Thank you.

The **Chairman**. We have to rely on these little lights, although I do not like to do it.

The Senator from Ohio.

Senator **Metzenbaum**. Mr. Chairman, I am sort of anxious to hear the next panel, so I am prepared to waive my time.

The **Chairman**. Thank you.

The Senator from Maryland, Senator Mikulski.

OPENING STATEMENT OF SENATOR MIKULSKI

Senator **Mikulski**. Thank you, Senator Kennedy.

I, too, wish to expedite the process of the proceedings and do not have any questions of this panel. I do wish to compliment the panelists on their very thoughtful presentations, and for the contribution they continue to make to our community, and Mr. Chairman, also to commend you on convening this hearing and the tireless effort that you continue to put forth in moving civil rights and particularly this legislation. While we hypocritically back expansion of democracy around the world by hiring bullies, we have to then try to deal with constricting it here. And I commend you for your leadership in expanding democracy here and around the world.

I would like to ask unanimous consent that my statement be entered into the record.

The **Chairman**. It will be printed in its entirety in the record.

[The prepared statement of Senator Mikulski follows:]

Prepared Statement of Senator Barbara A. Mikulski

The Civil Rights Restoration Act is neither a ground-breaking piece of legislation, nor a revolutionary idea in civil rights. This bill merely returns to our Nation's women, minorities, disabled and the elderly the legal rights and remedies they had prior to the U.S. Supreme Court's decision in *Grove City College* v. *Bell.*

This legislation would overrule the Supreme Court decision in *Grove City,* which substantially narrows the reach of title IX of the education amendments of 1972, the Federal law prohibiting sex discrimination in education.

The Court held that title IX's bar on sex discrimination applies only to the specific program or activity within an institution which receives Federal financial assistance, not the entire institution.

The *Grove City* decision threatens more than educational equity for women. Current laws outlawing discrimination on race, handicap, and age are also in jeopardy of being narrowly applied.

Title XI of the Civil Rights Act of 1964, the Age Discrimination Act, and section 504 of the Rehabilitation Act of 1973 are written with "program or activity" language similar to that of title IX.

That is why this legislation is so necessary, to simply restore the original scope of all these laws. So that entire institutions would be barred from discriminating when any of its parts receives Federal funds.

Comprehensive protection against gender discrimination in education is vital to the struggle for economic equality because education is the door to opportunity. It gives the individual the power to choose his or her own destiny. If the door to education begins to close again for women, their opportunities and their fundamental ability to control the direction of their lives will be necessarily restricted.

Before title IX was enacted, institutions routinely restricted women through the use of quotas, higher admission standards and by discriminating against them in the award of financial aid.

Since its passage and before the *Grove City* decision, women made great strides in obtaining vocational, graduate and professional degrees.

By cutting the protections of title IX, a devastating blow was inflicted on gains made in the last decade in the struggle for women's rights. Title IX's comprehensive protection against gender discrimination in education is vital to the struggle for economic equality.

Again, I must reaffirm, education is the door to opportunity—the opportunity to choose one's destiny. If the door to education begins to close again for women, the fundamental ability to control the direction of their lives will be restricted.

The Federal Government must not back down in its commitment to equality. Chief Justice Warren Burger, writing for the majority in the Bob Jones University case found, "Government has a fundamental, overriding interest in eradicating racial discrimination in education."

It has that same interest in eradicating gender discrimination in education.

Discrimination has no place in our society. The time is now long past due for passage of this legislation.

The CHAIRMAN. The Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

Let me go back to Mr. Larson. Mr. Larson, these are legitimate questions, and I want to have your answer and your response, and of course, I think the record will be somewhat binding by your answer and response as a proponent of the bill. So what we are doing is making a legislative record, and I do not personally care which way you answer; I would just like to build that record.

I asked the question using the definition found in the bill that a "program or activity" would apply to each entity to which the assistance is extended, would a local pharmacy be covered because a State administers reimbursements for prescriptions purchased at a pharmacy by individuals on Medicaid. And you said the answer is "No"; is that correct?

Mr. LARSON. That is correct. Senator Hatch, if it would be acceptable with you—I understand you want to make a record—but I would be very happy to respond in writing to any questions that you or your assistant, Mr. Rader, would like to submit.

Senator HATCH. But I would like to have it—I am not trying to delay this—that is fine, and you can respond in addition to that in writing. I would be happy to do that, and I will submit additional questions to you so you can respond in writing.

Mr. LARSON. I think we can develop a more developed and extensive record in writing, and there is a second panel.

Senator HATCH. There is a reason to ask them in open hearing, as you probably know. There are people interested here in what this bill means.

Mr. LARSON. Fine.

Senator HATCH. And I am interested in what this bills means as well, and that is why we have open hearings. Otherwise we would just do everything by written questions, do you see. We do a lot of that anyway, and I will send you some written questions.

Let me ask you this. In your opinion, would a grocery store be covered because a State welfare program administers the food stamp program, and the grocery store turns around and honors food stamps? Would that be covered by any aspect of this bill?

Mr. **Larson**. No, and for the same reasons I stated before.

Senator **Hatch**. All right. Now, moving on through the bill, clause 3 extends coverage to an entire plant or other comparable geographically separate facility to which Federal financial assistance may be extended or is extended. Under the Job Training Partnership Act, the JTPA, we have created what are known as Private Industry Councils or PIC's, as I'm sure you are familiar with, to coordinate the fund training on the local level. Now, let us say that a business has facilities in Utah, Nevada, and Colorado. Its Utah facility contracts with a local PIC Council to provide on-the-job training for economically disadvantaged individuals.

Now, under the bill, would the facility in Utah be covered?

Mr. **Larson**. I will have to defer that to the panel of experts, but I will also respond to that in writing. But I would point out, as the chairman, Senator Kennedy, pointed out, that even if that entity is covered, the only reason that it has to worry is if it is engaging in illegal discrimination.

Senator **Hatch**. Keep in mind, you get into a lot of problems there because there are differing viewpoints on what is or is not discrimination in society. Now, if the issue in S. 557—I think we all know discrimination when we see it—but when you get into issues like have been raised—abortion is just one illustration—to those who are anti-abortion, they think having abortion treated like any other medical procedure and being forced on any school even if it disbelieves in abortion is not proper, even though the Carter administration enacted regulations that are still in effect that would make it so.

You know, there are a lot of other——

Mr. **Larson**. Isn't the avenue not to put baggage on this legislation, but to go after those regulations, then?

Senator **Hatch**. No. The avenue is to clarify it and make sure, if we are going to pass this legislation, that we clarify so that we do not get into those kinds of problems.

You get into questions like educational institutions, separate dress codes for males and females. You get into questions like——

Mr. **Larson**. That was raised on Title IX, and is just foolish.

Senator **Hatch**. Well, it is certainly going to be raised in a lot of others—adoption by educational institutions of dormitory and residence policies. Do not tell me about that, because I have had to help resolve a lot of those problems. Adoption by educational institutions of counseling practices in which men and women are encouraged to pursue traditional careers—you get into questions on that. You can go down through a whole list of things where people differ on what may or may not be discrimination. And I think it is pretty simplistic for any attorney to come in and say, oh, this is all something that everybody understands. It is not. It is very complex.

Mr. **Larson**. This has not been a problem since 1964. Why is it a problem now?

Senator **Hatch**. It has been in the courts——

Mr. **Larson**. What does it have to do with this legislation?

Senator **Hatch**. We have a lot of litigation indicating that these are problems that occur, and we have a lot of regulatory changes that have had to occur in order to accommodate some of these problems. And if we pass a statute, we may not be able to have quite the flexibility to accommodate problems as they arise, that are legitimate, sincerely held problems that do not smack of rank discrimination.

Let me just go on with that last question, though. Would all the facilities of that business that is affiliated with Utah and other States be covered if the facility in Utah provides the training? Would all the other aspects of that business be covered—do you know? I presume your answer would be "No" because I think——

Mr. LARSON. No, the answer is whatever the coverage was before is the coverage now. It is the same. This does not change that. Whatever it was before *Grove City,* it will be after.

Senator HATCH. Mr. Larson, that is not simple, either, because in 1982, the Supreme Court held that, quote, "An agency's authority both to promulgate regulations and to terminate funds is subject to the program-specific limitation of sections 901 and 902." That was the North Haven case before the *Grove City* case. So they had established that the language is the language. Several courts of appeals——

Mr. LARSON. That is the language with regard to the fund cutoff.

Senator HATCH [continuing]. That existed pre-*Grove City.* So you are saying, oh, just what the language was pre-*Grove City.* Several courts of appeals had established that the program or activity limited certain actions under title IX as well pre-*Grove City.*

Mr. LARSON. With regard to the fund cutoff; not with regard to the coverage. On the coverage issue, there are dozens of cases in the Federal district courts and courts of appeals, talking about institution-wide coverage.

Senator HATCH. "Program or activity" applied to title VI; it applied to——

Mr. LARSON. With regard to fund cutoff; not with regard to coverage.

Senator HATCH. Well, I disagree with you on that, but let that be the case——

Mr. LARSON. I will be happy to supply you with the authority.

Senator HATCH. Supply it, and we will be happy to have it.

I might add that I believe that the way the bill is written, there will be many arguments made that if Utah provides the training that only the Utah facility would be covered, because they will claim that under clause 3(a), an entire corporation is covered only if the assistance is extended to the corporation as a whole.

Mr. LARSON. And it need worry only if it is engaging in discrimination.

Senator HATCH. Well, let me just ask you this. What if the corporation provides health care supplies—because you see, the bill says that any corporation or business which is, quote, "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." Now, would all the business be covered, or just the Utah entity?

You can provide the answer.

Mr. LARSON. The coverage will be the same as it was pre-*Grove City.*

Senator HATCH. Well, you see, that is what bothers me. I will not ask any more questions of the panel because that is what is bothering me. Nobody knows, really, what the coverage was pre-*Grove*

City. That is why we had the *Grove City* case. And there is plenty of dispute as to what pre-*Grove City* means.

I want to make it broader than the 1984 pre-*Grove City* situation. I would like to have these statutes apply institution-wide with regard to higher education, which is what the *Grove City* case was all about. But that is the problem. When you get into the specifics, either people will not answer, or they do not know, or they will rely upon the shibboleth that, well, we just want to go back to pre-*Grove City*.

I think we all want to go back to pre-*Grove City*—and more. But the question is, How is this statute going to be applied once it becomes law, and will it really do some of the things that I am raising, I believe it will do—sincerely raising—and not in the best interest of civil rights, not in the best interest of individual entities, not in the best interest of religious institutions, not in the best interest of small business, not in the best interest of State and local government and their right to government.

These are all legitimate questions. They are important questions. We cannot just skirt over them like they are nothing, and oh, we will go back to pre-*Grove City*. We have heard that for almost four years now. These are important things.

But I will wait until we get to probably the next day of hearings, and we will go into this in more detail.

The CHAIRMAN. If there are no further questions, we want to thank our panel.

Mr. HOOKS. Senator, may I ask a question? You said we would have the right to submit written answers.

The CHAIRMAN. Yes.

Senator HATCH. Yes, and we will submit written questions to all of you.

Mr. HOOKS. Thank you.

The CHAIRMAN. I want to thank our panel very much.

Senator HUMPHREY. Mr. Chairman, may I have a second round?

The CHAIRMAN. The Senator is recognized.

Senator HUMPHREY. I will keep it brief.

Senator WEICKER. Well, Mr. Chairman, I believe in the order of things, I would have an opportunity——

Senator HUMPHREY. I beg your pardon.

Senator WEICKER. I just want to set two things on the record, if I might.

Issue: S. 557 will force hospitals to perform abortions for the general public.

Response: False. No one is forced to perform abortions under current law and regulations, and there is no expansion under S. 557.

Issue: S. 557 will create new abortion rights.

Response: False. Neither abortion nor pregnancy are mentioned in the legislation. Additionally, nothing in the bill would expand the obligations of religious organizations to perform abortions. And indeed, General Counsel of the U.S. Catholic Conference, Wilfred Caron, stated in the legal analysis of last year's Grove City bill that the bill, quote, "would create no new abortion rights."

Over and out.

Senator HUMPHREY. Roger.

Senator **Hatch**. Well, Mr. Chairman, could I make one further comment on this, because I think it is important? It is nice to be able to say that, but the regulations say otherwise. And I can tell you that one of the problems that arises here is because nobody really knows what pre-*Grove City* was. And let me just read the regulations.

In section 106——

The **Chairman**. The Senator from New Hampshire is recognized.

Senator **Humphrey**. I yield, if I may, to the Senator from Utah.

Senator **Hatch**. In section 106.39 under "Health and Insurance Benefits", under chapter 1, title XXXIV, under "Education", the Office of Civil Rights, it basically goes through a whole paragraph and reads, "However, any recipient which provides full coverage health service shall provide gynecological care." So that is virtually every educational institution in the country.

Then, under 106.41, section 4, it says, "A recipient"—now, this is the Federal Government imposing upon any recipient of Federal funds pursuant to this bill, if it passes, but pursuant to any other bill that presently exists—"A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers or participates in with respect to students admitted to the recipient's educational program or activity," and then continues to talk about termination of pregnancy.

What I am trying to say is that these are not simple questions. We have a tendency when we call something a civil rights bill, as we did on the Voting Rights Act—you brought that up—I voted for the Voting Rights Act because I think it is one of the most important civil rights bill in history. This, in spite of losing on section 2, where they institutionalized the result to death—and the main questions I asked of Mr. Hooks, your representatives and others pertained to whether or not they would abolish at-large voting districts across this country, which is now being done, and everybody said oh, no, that would not happen.

Now, that is what happens. We get these civil rights bills, and they are an umbrella for covering a whole bunch of antifederalist policies, to use the Founding Fathers' language in this Bicentennial year, the biggest debate that occurred back in 1787, and now they pass it because everybody wants to support civil rights, including everybody on this committee——

Senator **Weicker**. Orrin——

Senator **Hatch** [continuing]. And then they turn around—yes, I will finish up—and then they turn around and they do precisely what they said will not apply and will not occur as we ask the questions. That is why these questions are important.

Senator **Weicker**. Mr. Chairman, Mr. Chairman——

Senator **Humphrey**. Mr. Chairman——

The **Chairman**. The Senator from New Hampshire.

Senator **Weicker**. Mr. Chairman, my time had expired——

Senator **Humphrey**. Not on my time, please.

Senator **Weicker**. My time had not expired. My time had not expired.

Senator Humphrey. But the Senator from New Hampshire was recognized. I would be happy to yield on the Senator's own time, if I may, Mr. Chairman.

The Chairman. The Senator from Connecticut.

Senator Weicker. The point I want to make to my distinguished colleague from Utah is that there is nothing in this bill that in any way changes the situation as it was one day prior to *Grove City* vis-a-vis abortion; absolutely nothing has changed.

Senator Hatch. No.

Senator Weicker. Nothing has changed, and the Senator knows that.

Senator Hatch. With regard to abortion.

Senator Weicker. Now you want to use this vehicle for you to bring about a change—but nothing has changed insofar as the law or the regulations are concerned.

And again—and I will not spend any further time on this, Mr. Chairman, because I do not want to see this legislation get bogged down as every other piece of legislation in the Congress—all we hear is about abortion, abortion, abortion, while the rest of the country and every other interest in the country gets laid aside.

Now, hopefully, we can address in this legislation the discriminations that have been permitted to continue now ever since the Supreme Court decision and focus on that.

And if you want to have an abortion debate, then put up an abortion bill, and let us have an abortion debate. For one minute, let us think about those other persons who have another problem, and let us address that problem.

Senator Hatch. Senator, I have raised a lot of things besides abortion here, a lot of things.

The Chairman. The Senator from New Hampshire is recognized.

Senator Humphrey. Thank you, Mr. Chairman.

Well, the subject of abortion is not unimportant. After all, there are many who believe that the offspring of human beings are human beings. Indeed, the logic of that conclusion is self-evident. And certainly, abortion kills human beings, and so it is not an inconsequential matter.

We believe that this bill will promote further practice of abortion.

It is interesting to note that the Religious Coalition for Abortion Rights is very hot about this bill and has endorsed it, and I will ask to put that in the record, their letter of endorsement.

I want to return to Ms. Smeal, because I still have a difference of opinion with her on the interpretation of this Act as it applies to hospitals that do not now perform abortions, but in my opinion would have to if this bill becomes law.

Am I not correct that the regulations under title IX, Ms. Smeal, require explicitly that abortion be performed on an equal basis with other medical procedures?

Ms. Smeal. You are misquoting those regulations, and this bill, as you know, does not deal with those regulations. This statute deals with Title IX statutory law, and there is a difference, and I——

Senator Humphrey. I will—may I have an answer?

Ms. Smeal. I am trying to answer the question.

Senator **Humphrey**. I will tie them together, but if you will answer the question. Am I correct——

Ms. **Smeal**. I am directly answering the question that you are misstating the regulations——

Senator **Humphrey**. No. You are debating.

Ms. **Smeal**. You quite abbreviated them.

Senator **Humphrey**. Well, you can say that I am misstating them.

Ms. **Smeal**. Well, you have.

Senator **Humphrey**. But stick to the regulations, if you will.

Senator **Hatch**. Well, I read them.

Senator **Humphrey**. Am I correct that the regulations under title IX provide explicitly that abortion services be provided on the same basis as other medical procedures? Am I correct?

Ms. **Smeal**. Not the way—Senator Hatch read regulations, and you are rephrasing them, and I am objecting to your rephrasing them. I am also——

Senator **Humphrey**. I think you are avoiding the question.

Ms. **Smeal**. I am not. I am saying you are summarizing, and I am saying——

The **Chairman**. Let the witness answer the question.

Senator **Humphrey**. I wish she would.

The **Chairman**. The witness is permitted to complete her answer.

We are going to insist on courtesy in this proceeding, and the witness is entitled to answer the question without badgering from any Member.

Senator **Humphrey**. Indeed. It is a new precedent, but please go ahead.

The **Chairman**. Well, it is one that will be the precedent as long as I am Chair of this committee.

Ms. Smeal will respond to the question.

Senator **Humphrey**. Yes, "the question."

The **Chairman**. I will ask the recorder to repeat the last question of the Senator from New Hampshire.

Senator **Humphrey**. Thank you. I thank the Chair.

[Whereupon, the reporter read from the record as requested.]

Ms. **Smeal**. And I am saying that you are paraphrasing the regulations, I believe, incorrectly. And I do not have them right in front of me, but Senator Hatch did read the regulation, and I do not think they match those words of your paraphrase.

That is my answer. And then the second part of my answer is that these regulations are not at issue on this statute.

Senator **Humphrey**. Well, I think they are, because if this bill were to pass, a hospital as part of a university system that is in any way receiving Federal funds would be required to comply with those regulations.

Do you dispute that—I mean, apart from the question of regulation.

Ms. **Smeal**. What you are saying is if this bill passes, what this bill is doing—and I have been dying to say this, as a couple of us on this panel have been when Senator Hatch asked the question—is that what this bill does—and there are many people listening to this report through television—it describes or defines or delineates what "program or activity" means; it explicitly states those words.

And it does not change other sections of title IX statute or title VI; it just tells people what this means. And the reason it did this is that the *Grove City* decision said—for the first time, *Grove City* departed with what four Presidents had interpreted these words, "program or activity", to mean—four Administrations, the Johnson, the Nixon, Ford and Carter; two Republicans and two Democrats all interpreted those words to mean that if you receive Federal funds, your entire institution-wide would be covered, and you would not be allowed to discriminate.

They then said under *Grove City*, the Supreme Court said, no, no, no, that interpretation is wrong, and it means just a specific program within the institution is covered by discrimination.

So what this statute only tries to say is no, the Court, you are wrong; the practices since 1964, title VI, the interpretation of the prior administrations was right; if you receive Federal funds, your entire institution is covered, not just a program that directly receives it. That is it. That is why I am saying it is being made too complicated. It is a very simple statute, and we are trying to stick to what it says.

The Chairman. The Senator's time has expired.

I want to point out, I think, as Senator Weicker has mentioned, these regulations were in effect for some nine years where these misinterpretations or leaps into fantasy were not evident. And the regulations existed through 1984 under this administration, when this administration could have changed them prior to *Grove City*, and they did not. If Mr. Reagan cares that much about it, he can change the regulations.

Senator HUMPHREY. Mr. Chairman.

The CHAIRMAN. We will submit any other questions to the panel.

Senator HUMPHREY. Mr. Chairman.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. We want to move on to the next panel, and this panel is excused.

Senator HATCH. Wait a minute, Mr. Chairman.

Senator HUMPHREY. Mr. Chairman.

The CHAIRMAN. This panel is excused.

Senator HATCH. Mr. Chairman, as ranking minority member, let me just ask a question of you here.

Now, look, I am not trying to delay this. I have waived my questions, and I have lots of other questions, and some of them are very relevant. But I have waived them, and I will submit them in writing.

But I have to insist that if Senator Humphrey has some legitimate questions to ask, he ought to be able to ask them. I admit it does delay the hearing a bit——

The CHAIRMAN. The Senator from New Hampshire is recognized for 5 more minutes.

Senator HATCH. Well, now, wait, wait a minute. We never cut you off in the whole 6 years I was chairman.

The CHAIRMAN. The Senator is recognized for 5 more minutes.

Senator HATCH. Now, wait. Is that all you are going to give him, is 5 more minutes?

The CHAIRMAN. That is all, that is right.

Senator HUMPHREY. That is enough.

The **Chairman**. That is enough.

Senator **Humphrey**. Because we are not going to resolve this, let us face it.

Senator **Hatch**. Well, I agree, but if he wants more, he ought to have more.

Senator **Humphrey**. But we do want the opportunity to make a point.

I am going to read the regulation as it is written.

"A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy"—that is abortion, right; I hope you will not disagree with that—"termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service," et cetera.

Now, have I distorted the regulation in reading it? [Pause.]

Now, am I not correct that if the bill before us becomes law, a hospital which is part of a university system which in any fashion receives Federal funds will have to comply with this regulation?

That is my assertion. Do you disagree with that?

Ms. **Smeal**. What I disagree with—I assume you are looking right at me, so you are asking me the question——

Senator **Humphrey**. Yes, Ms. Smeal, yes.

Ms. **Smeal**. What I disagree with is your inference from that, that a hospital would have to provide an abortion under these regulations. I agree with Senator Weicker's interpretation, that that is not true; it has not been the case in the past under title IX regulations.

I am also telling you that this has nothing to do with this hearing, because this hearing is on a statute, and it is not on those regulations.

Senator **Humphrey**. Oh, please, let us not be too awfully cute. I mean, we all know that——

Ms. **Smeal**. It is not cute; it is true.

Senator **Humphrey**. We all know that regulations are operative; that if we pass this bill then regulations are going to come to bear. What I am talking about is the effect, the real world effect, and I believe it is as I stated, that hospitals which do not now perform abortions for whatever reason, probably moral—which is a good reason—would have to provide and perform abortions if this bill becomes law. I think it is perfectly clear.

We will have an opportunity to discuss that with other witnesses.

I thank the chairman for his courtesy.

The **Chairman**. Fine, fine.

We want to thank our panel. As we have seen, there is not uniformity of opinion on this particular legislation, but I want to express my appreciation to the panel. I thought it was excellent testimony.

This issue is not a new one for our committee. We have had days, hours, weeks of hearings; we plan to have one additional hearing. But we have been over this ground.

I want to thank all of you very much for coming. We appreciate it. This panel is excused.

Our second panel includes Marcia Greenberger, National Women's Law Center; Key James, National Right to Life Committee, and James Wilson, of the city council, St. Louis, MO.

We will be in order. There is always a little turmoil when we are changing our panels. We would like to ask Marcia Greenberger, Kay James, and James Wilson if they would be good enough to come to the table.

Mr. **Wilson**. Mr. Chairman, I have a matter of indulgence. My name is Jim Wilson. I am the city attorney for St. Louis. I am asking the committee if my deputy, Eugene P. Freeman, who argued the *Poelker* case in the U.S. Supreme Court, 432 U.S. 519, could be seated at the table with us.

The **Chairman**. Yes, that is fine.

Ms. **James**. Mr. Chairman, may I also have my assistant join me at the table?

The **Chairman**. Of course.

Now, we will recognize Kay James of the National Right to Life committee, if she wants to go first.

STATEMENTS OF KAY JAMES, DIRECTOR OF PUBLIC AFFAIRS, NATIONAL RIGHT TO LIFE COMMITTEE, WASHINGTON, DC; JAMES WILSON, CITY ATTORNEY FOR ST. LOUIS, MO; AND MARCIA GREENBERGER, MANAGING ATTORNEY, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC

Ms. **James**. Yes, thank you.

The Chairman, distinguished members of the committee, my name is Kay Coles James. I am director of public affairs for the National Right to Life Committee, and I am also president of Black Americans for Life, which is an outreach project of the National Right to Life Committee.

The National Right to Life Committee is the Nation's largest nonsectarian prolife organization. NRLC represents 50 State Right to Life organizations and some 2,500 local Right to Life chapters.

At the outset, Mr. Chairman, I ask that my entire written statement be entered into the hearing record. I also ask that a National Right to Life legislative fact sheet and three legal memoranda be entered into the hearing record as extensions of my testimony. My oral testimony will be brief.

The **Chairman**. I will ask the committee to review that. We are glad to have the relevant material.

Ms. **James**. Thank you.

The **Chairman**. It will certainly be made a part of the file, and we will work out with the staff what parts to put in the record. I have no objection to——

Senator **Humphrey**. Mr. Chairman, is that regular procedure? I frankly have never seen that in eight years.

The **Chairman**. Yes, it has been when I have been the Chair. We will include any relevant materials, but just printing up long and voluminous records that get paid for by public expense, if they are not related to the matters, is not something we include. They will be made part of the file.

Senator **Humphrey**. May we inquire how voluminous this material is?

Ms. **James**. Not very much at all.

The **Chairman**. All right.

Ms. **James**. Thank you, Mr. Chairman.

Senator **Humphrey**. Will it be included, Mr. Chairman?

The **Chairman**. Yes. Is it just that document?

Ms. **James**. Yes.

The **Chairman**. That is fine.

Senator **Humphrey**. Thank you.

Ms. **James**. Thank you very much.

[The material referred to follows:]

national RIGHT TO LIFE committee, inc.

Suite 402, 419 7th Street, N.W.
Washington, D.C. 20004—(202) 626-8800

April 10, 1987

Thomas M. Rollins
Staff Director
Committee on Labor and Human Resources
Washington, DC 20510

Attn: Mr. Powell

Dear Mr. Rollins:

I am enclosing the corrected transcript of my March 19 testimony. Also enclosed are the three documents which I mentioned at the beginning of my testimony (page 97 of the transcript), which were accepted by Senator Kennedy for the hearing record (on page 98).

In addition, immediately after the hearing I submitted a letter clarifying my answer to one question which I entirely misunderstood. That question, and my answer, appear on page 109 of the transcript. The transcript is accurate, but my answer was not. I am again submitting my letter of clarification herein. Please reproduce it at the appropriate place in the hearing record.

Thank you for your consideration.

Sincerely,

Kay Coles James

Kay Coles James
Director of Public Affairs

enclosures

national
RIGHT TO LIFE
committee, inc.

Suite 402, 419 7th Street, N.W.
Washington, D.C. 20004 — (202) 626-8800

March 19, 1987

Senator Edward Kennedy
Chairman
Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

Thank you for affording me the opportunity to testify today before your committee regarding the abortion-related ramifications of the "Civil Rights Restoration Act" (S. 557).

Following my written testimony, Senator Metzenbaum asked me a question which I completely misunderstood, and consequently, my answer was inaccurate. I would like to correct the error. The exchange was as follows:

> Senator Metzenbaum: In your [March 27, 1986] USA Today column, you say that this bill is an attempt to advance pro-abortion policies. Last year, the Administration supported a bill introduced by Senator Dole which would have extended the ban on discrimination to an entire educational institution if it received federal funds. It had no provision modifying the current regulations [on abortion].
> Did you criticize the Administration at that time for attempting to advance pro-abortion policies?
>
> James: No, senator, we didn't.

Following the hearing, I listened to a tape recording of that exchange, and I realized that Senator Metzenbaum's question referred to S. 272, which had been proposed by the Administration as an alternative to the "Civil Rights Restoration Act." During the 99th Congress, the National Right to Life Committee took precisely the same position on S. 272 as we took on the "Civil Rights Restoration Act." That is, NRLC was opposed to S. 272 unless the Tauke/Sensenbrenner Amendment was added to neutralize the bill's pro-abortion effects.

Our abortion-related objections to S. 272 were expressed on every appropriate occasion, including correspondence to Senator Dole himself (see enclosed letter dated October 8, 1985). However, NRLC's opposition to the "Civil Rights Restoration Act" drew far more attention, for the obvious reason that the "Restoration Act" was actually moving through Congress. Following approval of the Tauke/Sensenbrenner Amendment and the "Civil

Rights Restoration Act" by the House Education and Labor Committee in May of 1985, little attention was paid to the "Administration bill" during the 99th Congress.

We are told the bill to be supported by the Administration this year, which has not yet been introduced, will contain the Tauke/Sensenbrenner provision. Since the Tauke/Sensenbrenner Amendment would nullify the pro-abortion legal effects of the bill, NRLC will neither support nor oppose this year's Administration bill.

I would be grateful if you would insert this letter of clarification, and the attached 1985 letter to Senator Dole, into the hearing record at an appropriate point following my testimony.

Sincerely,

Kay Coles James

Kay Coles James
Director of Public Affairs

enclosures

The Washington Times

PAGE 4A / *FRIDAY, APRIL 10, 1987*

‘Abortion free’ bill sought

Protestant and Jewish groups mounted a behind-the-scenes campaign yesterday to pressure Congress to pass proposed civil rights legislation without anti-abortion amendments sought by the Roman Catholic Church.

More than two dozen Protestant and Jewish religious leaders signed a letter to the Labor and Human Resources Committee headed by Sen. Edward Kennedy, Massachusetts Democrat, urging prompt enactment of an “abortion-clean” version of the long-stalled Civil Rights Restoration Act.

national
RIGHT TO LIFE
committee, inc.

Suite 402, 419 7th Street, N.W.
Washington, D.C. 20004 — (202) 626-8800

March 19, 1987

Debra Sutinen
Senate Committee on Labor and Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Sutinen:

At this morning's public hearing on the "Civil Rights Restoration Act" (S. 557), Senator Kennedy agreed to the request of Kay Coles James to include three documents for the hearing record, as extensions of her testimony. Those documents are enclosed: a factsheet published by NRLC, and two legal memoranda on the bill.

Senator Kennedy also agreed to include in the record certain documents referred to in the testimony of Mr. James Wilson. Those documents are found in the enclosed packet.

In addition, Mr. Wilson asked for and received permission to submit for the record a copy of a letter sent to Senator Kennedy by Robert B. Johnson, the chief executive officer of St. Louis Regional Medical Center. That letter is also found in the enclosed packet.

Thank you for your attention to these matters.

Respectfully submitted,

Douglas Johnson

Douglas Johnson
Legislative Director

cc: Senator Orrin Hatch

National Right to Life
FACTSHEET

PUBLISHED BY THE LEGISLATIVE OFFICE OF THE NATIONAL RIGHT TO LIFE COMMITTEE
419 7th Street, N.W., Suite 402, Washington, D.C. 20004 (202) 626-8820

The "Civil Rights Restoration Act"—How It Would Force Hospitals and Colleges to Provide Abortions

February 26, 1987

This factsheet provides background information on the pro-abortion ramifications of the "Civil Rights Restoration Act" (S. 557, HR 1214). Because the bill would force most universities and hospitals to provide abortions, the National Right to Life Committee (NRLC) opposes it, unless it is suitably amended. For further information, contact: Douglas Johnson, NRLC Legislative Director, (202) 626-8820.

WHAT IS THE "CIVIL RIGHTS RESTORATION ACT"?

In its 1984 ruling in *Grove City College v. Bell*, the U.S. Supreme Court ruled that Title IX ("Title 9") of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex" in federally funded educational programs, covers only the specific programs which receive federal funds--not the entire institution. That ruling applies by extension to similar laws dealing with discrimination on the basis of race, age, and handicap. The "Civil Rights Restoration Act" (S. 557, HR 1214) would expand these laws to cover "all of the operations of" any institution which receives federal funds.

WHAT IS THE CONNECTION BETWEEN TITLE IX AND ABORTION?

The crux of the problem is this: in 1975, federal administrators issued regulations--which have force of law--interpreting Title IX to require that federally funded educational programs treat abortion on the same basis as any other temporary disability "with respect to any medical or hospital benefit, service, plan or policy" for students, and like other temporary disabilities "for all job-related purposes" for employees (34 C.F.R. §§106.39, 106.40, 106.57).

So, although Congress has prohibited the use of federal funds for abortions, federally assisted colleges which do not pay for abortion can be sued for "sex discrimination" under Title IX! This glaring inconsistency must be corrected.

HOW WOULD THE "CIVIL RIGHTS RESTORATION ACT" AFFECT HOSPITALS?

The bill greatly expands the reach of the "abortion rights" which have already been "read into" Title IX. In light of the *Grove City* ruling, the Title IX regulations which mandate abortion services currently apply only to specific university programs which receive federal funds. However, under S. 557/HR 1214, the mandatory abortion regulations would apply to "all of the operations of" federally aided universities and other entities which have educational components. This means, for example, that any off-campus hospital which has even a single medical student, intern, nursing student, or other "educational" component, would be covered by the Title IX regulations which mandate abortion coverage.

Many hospitals currently choose not to provide abortions (or do so only under extraordinary circumstances), because of religious convictions, community sentiment, opposition to abortion among nurses, etc. Under the "Restoration Act," these hospitals would be required to provide abortion on the same basis as other medical services, or open themselves to lawsuits under Title IX.

DO ADVOCATES OF THE BILL AGREE THAT THE BILL WOULD HAVE SUCH EFFECTS?

Pro-abortion groups such as the American Civil Liberties Union (ACLU) and Planned Parenthood have publicly conceded that under the bill, the mandatory abortion regulations would cover all "educational activities" of hospitals. In other words, they concede that hospitals would be required to provide abortions to their residents, interns, nursing students, and all staff persons associated with the hospitals' teaching programs. This alone would be ample reason for pro-life Members of Congress to insist on revision of the bill.

However, some experts in sex discrimination law and abortion law note that the actual effect would be even more sweeping. Clearly, it would run counter to the entire thrust of the bill to limit the application of Title IX (and the abortion regulations) to only a hospital's "educational activities." The bill requires coverage of "all of the activities of" a federally funded educational institution. Robert A. Destro, professor of law at the Catholic University of America, has written that the bill would expose hospitals to lawsuits demanding that they provide abortions to the general public, and that such lawsuits would "quite likely" succeed. This assessment is shared by attorneys at NRLC and the Americans United for Life Legal Defense Fund. (Legal memoranda available upon request.)

UNDER THE BILL, WOULD RELIGIOUSLY AFFILIATED UNIVERSITIES AND HOSPITALS BE REQUIRED TO PROVIDE ABORTIONS?

Yes. That is why many such hospitals are insisting that the "Restoration Act" be amended. For example, the New York State Council of Catholic Hospitals calls the Tauke/Sensenbrenner Amendment to the bill "absolutely necessary" in order to prevent a "cutoff in federal aid to Catholic hospitals that refuse to perform abortions." (Full resolution available upon request.)

The abortion regulations have already been used to harass religiously affiliated colleges. During the past two years, complaints have been filed against nearly 700 institutions of higher education--including hundreds of Roman Catholic, conservative Protestant, and orthodox Jewish colleges--alleging violation of the regulations. Some of these institutions thereby have apparently been frightened into funding abortions, despite their religiously based objections to abortion. (In some other cases, the Department of Education has ascertained that Title IX does not apply under the Grove City College ruling, because the college's health plan has received no federal support.)

CAN'T RELIGIOUSLY AFFILIATED INSTITUTIONS CLAIM A "RELIGIOUS TENETS EXEMPTION" UNDER SEC. 901 (3) OF TITLE IX, AND THEREBY ESCAPE THE ABORTION REQUIREMENTS?

A college which is legally "controlled by a religious organization" is entitled to an exemption from requirements of Title IX which conflict with tenets of the religion in question. But this provision no longer provides reliable protection for religiously affiliated colleges, because most "religious" colleges and hospitals nowadays are "controlled by" lay boards, not by church officials. For example, Notre Dame and Georgetown universities are governed by lay boards.

It is true that the Reagan Administration Department of Education has generally regarded such religiously affiliated colleges as qualified for the religious tenets exception. But this broad interpretation of Sec. 901(3) is controversial, and may not withstand potential legal challenges. Rep. Patricia Schroeder (D-Co.) says that schools like Notre Dame are not entitled to claim the exemption. As Schroeder told National Public Radio (March 11, 1986): "I think both Georgetown and Notre Dame have really moved over that line and said, 'We are now secular.'"

Also, even expanding the "religious tenets" exemption clause would not protect the many secular colleges and hospitals which do not wish to provide abortions.

CAN THE ABORTION ISSUE BE SEPARATED FROM TITLE IX?
A simple amendment to the bill would make it clear that Congress does not wish to force universities and hospitals to provide abortions. Such an amendment has been proposed by Congressmen Thomas Tauke (R-Iowa) and F. James Sensenbrenner (R-Wi.):

> **"Nothing in this title [Title IX] shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion."**

WHAT IS THE LEGAL EFFECT OF THE TAUKE/SENSENBRENNER AMENDMENT?
The amendment simply means that universities and hospitals which do not include abortion among their student and employee "medical or hospital benefit[s]" would not be guilty of "sex discrimination" under Title IX.

DOES THE TAUKE/SENSENBRENNER AMENDMENT PROHIBIT FEDERALLY FUNDED UNIVERSITIES AND HOSPITALS FROM OFFERING ABORTIONS?
No. The amendment explicitly states that Title IX does not "deny any right relating to abortion or the funding thereof, or...prohibit...any benefit or service relating to abortion." The amendment means that abortion "services" would be optional--not mandated by the federal government.

DOES THE CIVIL RIGHTS RESTORATION ACT SIMPLY RESTORE TITLE IX TO ITS PRE-1984 STATE, AS ITS PROPONENTS CLAIM?
With respect to abortion, the "Restoration Act" would not simply restore the law as it stood prior to the 1984 Supreme Court ruling in Grove City College. If the bill is enacted without the Tauke/Sensenbrenner Amendment, the mandatory abortion regulations will for the first time apply to many off-campus hospitals, because of the bill's expansive definition of "program or activity."

DOES THE TAUKE/SENSENBRENNER AMENDMENT "RESTORE" TITLE IX TO ITS ORIGINAL STATE?
Yes, the Tauke/Sensenbrenner Amendment restores Title IX to its original "abortion neutral" meaning. When Title IX was enacted in 1972, performing an abortion was still a felony in most states. It is absurd to argue that in 1972 Congress intended to require federally aided institutions to fund felonies.

IN 1985, REP. DON EDWARDS PROPOSED AN "ALTERNATIVE" TO THE TAUKE/SENSENBRENNER AMENDMENT. HIS "ALTERNATIVE" STATED THAT THE BILL IS "NOT INTENDED TO CONVEY EITHER THE APPROVAL OR DISAPPROVAL OF CONGRESS" REGARDING THE TITLE IX ABORTION REGULATIONS. WOULD SUCH LANGUAGE RENDER THE BILL "NEUTRAL" ON ABORTION?
Certainly not. Such language would leave the current pro-abortion regulations fully in force. And if the bill is enacted with the regulations in force, then the reach of the regulations will be vastly expanded--covering most hospitals for the first time, as explained above.

FEMINIST ORGANIZATIONS SAY THAT THE TAUKE/SENSENBRENNER AMENDMENT WOULD PERMIT FEDERALLY FUNDED COLLEGES TO PENALIZE--EVEN TO EXPEL--WOMEN WHO PROCURE ABORTIONS. This is untrue. The Tauke/Sensenbrenner Amendment is clearly directed only to the issue of whether Title IX should force universities and hospitals to provide abortions (as spelled out on pages 20-21 of the report issued by the House Education and Labor Committee, #99-963 Part 2). The specter of women being penalized for procuring abortions on their own is a red herring.

This was amply demonstrated in 1986, when a group of sponsors of the Civil Rights Restoration Act proposed a "compromise" amendment which more explicitly prohibited penalization of women who obtain abortions, while removing all mandatory abortion requirements from Title IX. NRLC and the U.S. Catholic Conference agreed to support such a revised amendment, since the legal effect would be identical to the Tauke/Sensenbrenner Amendment. But the National Organization for Women and other feminist advocacy groups firmly rejected any language which would allow federally aided institutions to refuse to pay for elective abortions under health plans.

WHY CAN'T THE REAGAN ADMINISTRATION SIMPLY CORRECTLY INTERPRET TITLE IX, AND ABOLISH THE REGULATIONS WHICH REQUIRE ABORTION, WITHOUT CONGRESSIONAL ACTION? The mandatory abortion regulations have been in effect since 1975. It is very unlikely that the federal courts would permit the Administration to adopt a contrary interpretation after 12 years. Moreover, even if it were possible for the Administration to abolish the abortion regulations, a subsequent pro-abortion Administration could simply revive the current interpretation. Congressional action is necessary to render Title IX truly "abortion neutral." Congress has done something similar with respect to another sex discrimination law, Title VII of the Civil Rights Act of 1964 [see 42 U.S.C. § 2000e(k)].

N.O.W. AND OTHER PRO-ABORTION GROUPS SAY THAT THE CIVIL RIGHTS RESTORATION ACT HAS BEEN "HELD HOSTAGE" BY N.R.L.C. AND OTHER ANTI-ABORTION GROUPS. IS THIS TRUE? NRLC does not oppose the bill if it includes the Tauke/Sensenbrenner Amendment. When the bill was marked up by the House Education and Labor Committee in May, 1985, the Tauke/Sensenbrenner Amendment was approved on a bipartisan vote, with the support of all pro-life and some pro-abortion members. During late 1985 and throughout 1986, NRLC repeatedly and publicly urged immediate action on the amended bill by the full House. The bill never reached the House floor during the 99th Congress because it was "held hostage" by pro-abortion groups which recognized that a majority of House members would support the Tauke/Sensenbrenner Amendment.

REP. PETER RODINO HAS SUGGESTED THAT THE TAUKE/SENSENBRENNER AMENDMENT IS "UNNECESSARY" BECAUSE A 1973 LAW CALLED THE "CHURCH AMENDMENT" STATES THAT FEDERALLY FUNDED HOSPITALS NEED NOT PERFORM ABORTIONS. The "Church Amendment" (42 U.S.C. § 300a-7) applies only to requirements attached to the direct receipt of funds under three (and only three) programs: the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Constructions Act. These narrow, program-specific provisions are essentially irrelevant to the Title IX controversy. Under the Civil Rights Restoration Act, a hospital is regarded as an extension (or "operation") of the medical or nursing school with which its staff or students are associated. Neither the hospital nor the medical school would need to receive direct federal aid in order for Title IX to apply to a hospital, because any form of federal aid to any department or any student at the university itself would trigger Title IX coverage, if the hospital has on staff a single student associated with the university's medical school! (Moreover, many hospitals receive direct federal aid from programs other than those mentioned in the "Church Amendment.")

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MEMORANDUM

TO: Interested Parties
FROM: James Bopp, Jr., General Counsel, National Right to Life Committee
RE: Ramifications of S.557 (The Civil Rights Restoration Act of 1987) With Respect to Abortion
DATE: March 4, 1987

As General Counsel for the National Right to Life Committee, you have requested my legal opinion on the effect of S.557 on the abortion requirements of Title IX and the need for support of the Tauke/Sensenbrenner Amendment to the above-entitled Act. Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance." 20 USC §1681. In regulations promulgated under this Title, educational institutions receiving federal assistance are required to treat pregnancies and termination of pregnancies the same as other temporary disabilities for the purpose of student and employee leave policies and health benefits. 34 CFR §106.39, §106.40, and §106.57.

Under the current state of the law, Title IX has relatively limited application and the regulations referred to above are subject to repeal. S.557, however, would substantially change this state of affairs in the following ways:

1. The scope of application of Title IX would be dramatically increased to include the entire agency or department of education of a state or local government if any activity, program or entity within the agency or department receives federal financial assistance. Thus, the applicability of Title IX would be extended to include all state-run university hospitals if any federal financial assistance is received by any part of the university system. In addition, any hospital which, for instance, received funds from a medical school in connection with a residency program at the hospital, would also be covered by Title IX. Thus, S.557 results in a substantial expansion of the applicability of Title IX to institutions, particularly university hospitals and private hospitals cooperating with state medical and nursing schools, which are currently beyond the reach of Title IX.

2. S.557 in Sec. 2(2) seeks to incorporate, as statutory construction of Title IX, the "prior consistent and long-standing executive branch interpretation...of those laws as previously administered...." The result of this language is to incorporate into Title IX the principle contained in the offensive abortion-related regulations referred to above. This principle is that discrimination on the basis of sex includes failure to provide abortion related services when providing services related to pregnancy.

The result of the adoption of S.557 would no doubt prevent the effective repeal of these abortion regulations. Even more ominously, with this principle now incorporated within Title IX, teaching hospitals, which would now come within the scope of Title IX, would be required to provide abortion services to their residents, interns, nursing students and teaching staff. In addition, such teaching hospitals would be vulnerable to Title IX based law suits demanding that the hospital also provide or allow abortions to the general public. These suits would claim that "no person...shall, on the basis of sex,...be denied the benefit of or be subject to discrimination..."at the teaching hospital. Thus, since S.557 has incorporated into Title IX the principle that discrimination on the basis of sex includes failure to provide abortion-related services, the teaching hospital would be required to provide them to the general public.

Without an abortion-neutralizing amendment, therefore, S.557 would have a substantial effect on abortion by preventing a wide variety of institutions, most currently not covered by Title IX, from excluding abortion as part of their services. Particularly at risk are public and private hospitals which receive funds from state-affiliated medical schools, nursing schools or other health care education programs.

The Tauke/Sensenbrenner Amendment is intended to prevent this effect. The Tauke/Sensenbrenner Amendment amends Title IX and provides that: "Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion."

This amendment would insure that Sec. 2(2) of S.557 would not have the effect of incorporating into Title IX, as a matter of statutory construction, the principle now embodied in the regulations under Title IX that failure to provide abortion services or benefits constitutes discrimination on the basis of sex. In addition, this amendment insures that Title IX would not allow an institution to penalize anyone for an abortion since it provides that nothing in Title IX shall be construed to "deny any right relating to abortion...or prohibit any person, public or private entity or organization, to provide any benefit or service related to abortion."

As an alternative to the Tauke/Sensenbrenner Amendment, Congressman Don Edwards in 1985 proposed an amendment, which purported to accomplish a similar result. Unfortunately, the amendment offered by Congressman Edwards does not address the result outlined above. Specifically, Congressman Edwards' amendment provided that "The amendments made by this Act are not intended to convey either the approval or disapproval of Congress concerning the validity or appropriateness of regulations issued under Title IX of the Education Amendments of 1972 concerning health care insurance or services, or both, for employees and students with regard to abortion." This amendment, if adopted, would declare Congress' neutrality on the validity of the regulations under Title IX while not addressing the effect of S.557 on the interpretation of Title IX itself. Thus, S.557 would still incorporate within Title IX the sexual discrimination principle outlined above. Thus, the Edwards' amendment is neutral on the regulations under Title IX but does not render Title IX neutral on abortion. S.557 would continue to have a substantial pro-abortion impact by requiring public and private hospitals, which receive funds from state-affiliated medical schools, nursing schools or other health care educational programs, to provide abortion services.

In addition, Congressman Rodino, Chairman of the House Judiciary Committee, has argued "that the Tauke/Sensenbrenner Amendment is unnecessary" because of a 1973 law called "the Church Amendment." 42 USCA §300 a-7.

The Church Amendment provides that "the receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require" participation in abortions, "if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."

In his letter, Mr. Rodino conceded that under HR 700, the predecessor of S.557, a hospital would be subject to Title IX "when it operates a teaching program such as a nursing program." He added, however, that

> it is unlikely that a hospital--even one subject to Title IX--would have to perform abortions because of the "Church Amendment" (named for Senator Frank Church) which was adopted in 1973. According to the "Church" amendment, hospitals receiving public

> health funds, which is virtually every hospital, need not perform abortions if doing so would violate their conscience.

The result claimedd by Congressman Rodino is not the case. The Church Amendment only insures that the receipt of federal funds under the Public Health Service Act, the Community Mental Health Centers Act or the Developmental Disabilities Services and Facilities Construction Act "does not authorize any court or any public official or other public authority to require" such entity to make its facilities available for the performance of abortion. Thus, under the Church Amendment, receipt of funds under these programs are made abortion neutral.

The Church Amendment, however, does not shield a recipient from the requirements that would be imposed under Title IX, now or after the passage of S.557. Even though these other three programs are abortion neutral, Title IX is not and the Church Amendment is no shield from it.

Finally, S.557 contains a "religious tenets exception" which exempts from the requirements of Title IX the "operation of an entity which is controlled by a religious organization if the application of §901 to such operation would not be consistent with the religious tenents of such organization." Unfortunately, this religious tenets exemption is extremely narrow in the protection it affords entities from the abortion requirements of Title IX. The religious tenets exemption in S.557 requires that the entity be "controlled by" a religious organization. In recent years, while some hospitals and educational institutions are affiliated with religious organizations, few are controlled by them. Thus, many public and private hospitals who currently refuse to provide abortion services would not be protected by the religious tenets exemption. As a result, it is my opinion that, in order to assure that Title IX does not impose substantial abortion requirements, the Tauke/Sensenbrenner Amendment should be supported.

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MEMORANDUM

TO: Interested Parties

FROM: Edward R. Grant, Executive Director/General Counsel
Clarke D. Forsythe, Staff Counsel
AUL Legal Defense Fund

DATE: March 2, 1987

RE: Ramifications of the "Civil Rights Restoration Act" (S. 557) With Respect to Abortion

A. Current Federal Regulations Pertaining to Treatment of Abortion by Institutions Affected by S. 557

Certain regulations promulgated by the Department of Education and its predecessor, the Department of Health, Education, and Welfare, create strict obligations on the part of educational institutions to provide funding and other support for abortion. These regulations, first promulgated in 1975 to implement Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1982)("Title IX") require that educational institutions receiving federal financial assistance treat abortion ("termination of pregnancy") on a par with other medical treatments for pregnancy. 34 C.F.R. Pts. 106.39, 106.40 (pertaining to students), 106.57 (pertaining to employees).

B. Effect of S. 557 Upon Current Title IX Abortion Regulations

The effect of passage of S. 557 unamended would be to ratify these regulations as explicitly in accord with the will of Congress and to extend the scope of these regulations into programs not heretofore covered.

1. Ratifying the Title IX Abortion Regulations.

Unless amended, S. 557 would likely ratify these regulations because the bill specifically speaks of restoring "the prior consistent and long-standing executive branch interpretation and broad, institutionwide application of those laws [including Title IX] as previously administered." (Emphasis supplied). This would be interpreted as a statement of Congressional intent not only to ratify the scope of Title IX enforcement prior to the Grove City decision, but also the interpretation given to the substance of Title IX by DHEW and subsequently by DOE.

2. Expanding the Scope of Title IX Within Institutions.

Unless amended, S. 557 would also extend the reach of the Title IX abortion regulations to cover college and university health insurance plans at any institution that receives federal funds, directly or indirectly (as through student scholarships or subsidized loans), regardless of whether that health insurance plan receives direct federal funding. This reflects the primary purpose of S. 557 to provide institution-wide application of federal civil rights statutes and regulations to institutions receiving federal financial assistance.

3. Expanding the Scope of Title IX Beyond Educational Institutions to Hospitals.

Unless amended, S. 557 would also expand the reach of the Title IX abortion regulations beyond the confines of the educational institution. This bill would expand the coverage of Title IX to any hospital which operates "federally assisted education programs or activities." Thus, if a hospital participates in a program of nursing or medical education in affiliation with a university or medical school, and that university or medical school receives any federal assistance whatever, including federal scholarships, student loans, or research grants, the participating hospital is brought within the scope of Title IX. Thus, at least with respect to residents, interns, nursing students, and teaching staff, the hospital would have to provide abortion coverage, since the refusal to provide such coverage would be deemed "sex discrimination" in violation of Title IX.

4. Requiring Hospitals to Provide Abortions to the General Public.

From requiring hospitals to provide abortion coverage to interns, residents, nursing students and teaching staff, it would be a small step to require the hospital to provide abortion services to patients in general. Current Title IX regulations define the refusal to fund abortions in federal programs as "sex discrimination." If such regulations have been ratified by Congress, a federal court may view favorably a lawsuit alleging that the refusal of the hospital (which receives significant federal funding) to provide abortions to patients is also "sex discrimination". Nothing in S. 557 would forbid such a construction, and a court is likely to be influenced by the "spirit" of non-discrimination which is at the core of S. 557. It may view S. 557 as a mandate to root out "discrimination", including the failure to provide abortion services.

C. Why Adoption of the Edwards "Abortion Disclaimer" Language Would Not Remove the Pro-Abortion Impact of S. 557

The proposed "disclaimer" language of Rep. Don Edwards would not prevent the results outlined in Parts A and B of this memorandum. The Edwards disclaimer amendment merely states that S. 557 is "not intended to convey either the approval or disapproval of Congress concerning the validity or appropriateness of regulations issued under title IX . . . concerning health care insurance or services, or both, for employees and students with regard to abortion."

This amendment neither overturns the regulations, nor rejects any prior Congressional ratification of those regulations. The Title IX regulations would remain intact, and those aspects of S. 557 which broaden the applicability and enforcement of federal law and regulations concerning civil rights would apply to the intact abortion regulations. The Edwards amendment would clearly permit the extension of Title IX regulations into hospital teaching programs.

Adoption of the Edwards amendment would clearly _not_ render S. 557 "abortion-neutral."

D. Why the "Church Amendment" Does Not Remove the Pro-Abortion Impact of S. 557.

The Church Amendment, 42 U.S.C. § 300a-7, provides that recipients of federal assistance under three statutes (the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act) are not required to provide abortions if the recipient has a moral or religious objection to doing so. The Church Amendment applies _only_ to recipients of funds under these three programs.

The coverage of the Title IX regulations is, of course, far broader, and under S. 557 (unamended), would supercede the abortion-neutral provision of the Church Amendment. Thus, whether or not a facility is a recipient of federal funds under the three programs listed, Title IX coverage would be triggered by federal aid of any type whatever to the university which operates the medical school, nursing school, or other educational program to which the hospital's teaching program is linked.

The Church Amendment simply states that the receipt of funds under the three specified programs does not carry a concomitant obligation to provide abortion services. S. 557 would render that protection irrelevant by instituting an entirely independent obligation to provide abortion services under the Title IX regulations. Thus, the consideration of the Church Amendment in this discussion is a red herring.

E. The Tauke/Sensenbrenner Amendment is Neccesary to Cure the Mandatory Abortion Policy of the Title IX Regs and S. 557

It is clear from the analysis presented here that current Title IX regulations have a clear pro-abortion effect that will be greatly expanded and intensified by enactment of S. 557 in its present form. It is also clear that none of the alternatives to a true abortion-neutralization amendment of S. 557 will, in reality, address these severe problems.

In order to cure the mandatory abortion aspects of the Title IX regulations and S. 557 it is necessary to amend S. 557 with the "Tauke/Sensenbrenner Amendment." The House Education & Labor Committee recognized this in 1985 when it adopted Tauke/Sensenbrenner by a wide bipartisan vote on a mark-up of a predecessor to S. 557.

F. The "Religious Tenets" Exception to Title IX Does Not Cure the Mandatory Abortion Impact of S. 557

For two reasons, the "religious tenets" exception of Title IX [§ 901(3)], and of S. 557, will not cure the mandatory abortion impact of S. 557.

First, the exception does nothing to cure the mandatory abortion impact as it applies to non-religious educational institutions and hospitals. Such institutions, whose opposition to abortion coverage may be premised upon other grounds of conscience or community responsibility, will be coerced to adopt a pro-abortion policy.

Second, the scope of the "religious tenets" exception may be very narrow, especially in the hands of future administrators hostile to the anti-abortion position. As stated in Title IX and S. 557, the exception applies to those institutions "controlled by a religious organization." In fact, many religious colleges and universities are no longer "controlled" by religious denominations, but by lay boards of trustees. Thus, while "affiliated" with a religious denomination, institutions such as Georgetown and Notre Dame may be said to fall outside of the religious tenets exception.

Thus, the religious tenets exception does not cure the basic problem posed by S. 557, and offers unreliable protection to a vast number of religiously-affiliated colleges and universities.

**national
RIGHT TO LIFE
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October 8, 1985

Senator Robert Dole
United States Senate
141 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Dole:

The National Right to Life Committee--composed of 50 state affiliate organizations and over 2,000 local chapters--is alarmed by the pro-abortion implications of the bills which have been introduced to overturn the Supreme Court's 1984 ruling in *Grove City College v. Bell*.

Our own attorneys and the legal scholars who we have consulted--experts in abortion law and civil rights law--have concluded that either Sen. Kennedy's "Grove City" bill (S. 431) or your own S. 272 could be a major new legal tool in the hands of pro-abortion groups. Therefore, we strongly urge your active support for an "abortion-neutralization" amendment to whichever bill comes before the Senate.

Both bills amend Title IX of the Education Amendments of 1972. In 1975, federal administrators issued regulations which interpreted Title IX to require that all federally funded colleges provide abortion insurance and other abortion services on the same basis as other "medical benefits." Failure to do so is deemed *sex discrimination* under these Title IX regulations.

Unfortunately, the pro-abortion regulations have now been in force for ten years. It is unlikely that the federal courts would permit them to be abolished by simple administrative action.

Furthermore, if Congress enacts a bill amending Title IX without *explicitly negating* the pro-abortion regulations, Congress will thereby render the regulations even more invulnerable to legal challenge.

Worse, either bill would have the "side effect" of *expanding* the reach of the pro-abortion regulations. Our legal experts advise us that either bill could be construed to apply the pro-abortion regulations to all *hospitals* with teaching programs (e.g., interns, residents, nursing students). Even many hospitals affiliated with religious bodies could be affected, because Title IX's current "religious exemption" is so narrowly drawn.

It is a major priority of the National Right to Life Committee to render

Senator Robert Dole, page two

federal sex discrimination law neutral on abortion. This can be accomplished by adoption of a simple "abortion-neutralization" amendment to either S. 431 or S. 272. The amendment--sponsored in the House by Representatives Tom Tauke and F. James Sensenbrenner--reads as follows:

> **"Nothing in this Title [Title IX] shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion."**

The House Education and Labor Committee has adopted this amendment on a bipartisan vote. The amendment would remove the current obligation for federally funded colleges to offer abortion services, and would prevent hospitals from being compelled to become abortion mills. The amendment would not authorize punitive action against women who have procured abortions, which in any event would be impermissible under the Supreme Court's Roe v. Wade ruling.

We would be grateful if you would play an active role in support of the abortion-neutralization amendment, when the Senate addresses the Grove City issue.

We would appreciate the opportunity to meet with you in person, at your convenience, to discuss this issue in greater detail.

Thank you for your consideration.

Respectfully submitted,

John C. Willke, M.D.
President

enclosures

THE IMPACT OF THE "CIVIL RIGHTS RESTORATION ACT"
ON RELIGIOUSLY AFFILIATED INSTITUTIONS WHICH OPPOSE ABORTION

Excerpts from a debate on the "Civil Rights Restoration Act"

Between

Douglas Johnson, Legislative Director, National Right to Life Committee

and

Mark Bartner, Legislative Coordinator, Religious Coalition for Abortion Rights

Broadcast on the radio program "Contact America"

April 10, 1987

INTRODUCTION: The National Right to Life Committee, the National Association for Evangelicals, the U.S. Catholic Conference, the Catholic Hospital Association, and other pro-life groups oppose the "Civil Rights Restoration Act" (S. 557, HR 1214) because it expands the reach of a federal "sex discrimination" law, Title IX (Title 9), which has been interpreted to require certain institutions receiving federal funds to provide abortions. These groups support an amendment to the bill-- called the Danforth Amendment in the Senate and the Tauke/Sensenbrenner Amendment in the House-- which would make Title IX inapplicable to abortion.

In this broadcast debate, Mark Bartner, legislative coordinator for the Religious Coalition for Abortion Rights (RCAR), defended the bill and opposed the amendment. RCAR is a coalition of religious bodies which lobbies for unrestricted legal abortion and for federal funding of abortion.

Mr. Bartner argued that institutions which receive federal funds generally should to be required to provide abortion services. In addition, he argued that the bill would apply this policy to all religiously affiliated colleges and hospitals except those directly controlled by church officials. For example, both Notre Dame University and a typical Catholic hospital would be required to provide health insurance coverage for abortions under the bill, Mr. Bartner said.

A cassette recording of the complete debate is available for $5.00 from: Contact America, 717 Second Street Northeast, Washington, D.C. 20002. Request the April 10 debate on the "Civil Rights Restoration Act."

DEBATE ON ABORTION RAMIFICATIONS OF "CIVIL RIGHTS RESTORATION ACT," PAGE 2

Bartner: Nobody is being forced to provide an abortion.

Johnson: Oh? Well, the [current Title IX] regulations certainly require that federally funded educational programs provide abortions, don't they?

Bartner: Their health plans for students and employees cover abortions, unless they are exempted from the coverage by the religious tenets exemption.

Johnson: Okay, you've referred several times, Mark, to the religious tenets exemption. Let's talk about that for a minute.

Bartner: Okay.

Johnson: When Title IX was passed, it did carve out a narrow exception for organizations which are "controlled by a religious institution." If such an organization claims that there's a conflict between the requirements of the sex discrimination law [Title IX] and its religious faith, they can claim an exemption. However, "controlled by" is a legal term of art-- and it covers very, very few religiously affiliated colleges or hospitals.

Let me use an example of the Catholic institutions [hospitals], none of which provide abortions. Almost no Catholic hospitals are legally "controlled by" the Catholic Church. Therefore, none of them would qualify for this religious exemption to which you keep referring. And that is why the Catholic Hospital Association is opposed to this bill, unless the pro-life amendment is adopted.

Bartner: And those institutions are not being forced to provide abortions.

Johnson: Of course they're not, because they're not yet covered by the sex discrimination law. But they will be under this bill! And they understand that very well.

Bartner: We don't think that's correct. If they were not covered before, then they're not going to be covered now [under the bill].

Johnson: Well, they have teaching programs. These teaching programs tie them to secular universities which receive federal funds. And it is conceded by the Leadership Conference on Civil Rights that they will be covered.

Their only arguable protection against the pro-abortion law is a religious tenets claim--and, as I've just explained, they don't really qualify for that, because they are not "controlled by" the Catholic Church, in the legal sense, although they have a Catholic religious identity, and that is what leads them not to provide abortions.

Bartner: That is correct.

Johnson: The same could be said of some Southern Baptist institutions, Mormon, and many others. Very few of these, in this day and age, are legally "controlled by" these church bodies, and therefore they do not really qualify for this very narrow exception.

Bartner: That is correct. Because the issue here is the receipt of federal funds. And these institutions are desiring to go beyond their original, narrow religious orientation, toward a broader acceptance of students and faculty with diverse views, and the receipt of federal funds, which is very important to a lot of these educational institutions.

******

Peter Waldron (host): Let's expand for a minute on this whole "religious tenets" exemption. Help me understand what that is and who is eligible for such.

Johnson: Well, Peter, I think we were getting to a very pivotal point in the discussion just before the break. Again, the current law exempts from the sex discrimination law only those colleges which are "controlled by" a religious institution. That means, according to the attorneys, that the majority of the board of directors has to be church officials, ecclesiastical officials--bishops, members of a religious order, or whatever.

Now, the fact is, in recent years the great majority of church-affiliated institutions have turned over legal control to boards which are made up primarily of laypeople. They'ye done that to be eligible for federal funds, for accreditation purposes, and other reasons. There are very few colleges in the United States which consider themselves religiously affiliated which anymore legally qualify for this [religious tenets] exemption.

Therefore, if this bill passes, they will virtually all be vulnerable to lawsuits if they treat abortion differently from any other "medical procedure"--that's to say, if they fail to pay for it under their student health plans or whatever. That same will be true of the religiously affiliated hospitals.

I think that Mr. Bartner was pretty close to saying that, indeed, these institutions do not deserve to be exempt if they are not controlled by church officials. Is that the case?

Bartner: That is correct. According to the positions of the religious denominations and the religious organizations which I represent...

Johnson: Which are pro-abortion...

Bartner: ...which are pro-choice, to some extent...and others in the leadership coalition [the Leadership Conference on Civil Rights] which are not members of RCAR, but which nevertheless support the Civil Rights Restoration Act without amendment.

Johnson: But I'm talking about the religious institutions which are against abortion.

Bartner: Okay. We believe that there is a constitutional right to abortion. And if there are not legitimate religious grounds to exempt that institution from that coverage [of Title IX], then that coverage should be provided.

Johnson: Well, let's get specific. Congresswoman Patricia Schroeder [D-Co.], who is a very prominent advocate of the bill which you're defending, stated that Notre Dame University should not receive a religious tenets exemption, because they are not directly controlled by the Catholic Church.

Bartner: If Notre Dame desires to continue receiving federal funds, and if Notre Dame wishes to be construed as a nonsectarian institution, and open its faculty and its student body to non-Catholic students, which it has done, then it should not be covered as a religiously controlled and hence exempt institution. It should reflect the religious diversity of its student body and faculty.

Johnson: Okay, so this is an important point. [You say that] Notre Dame University should be covered by Title IX, and it should not be able to claim the religious tenets exemption in order to avoid having to provide abortions. Am I understanding you correctly?

Bartner: I don't know how this would work out. Notre Dame, I don't believe, was providing abortions before the Grove City [Supreme Court] decision. I don't know if they're going to be forced to do so afterwards.

Johnson: But now you're jumping away! We were right up to a very simple train of logic. Notre Dame does admit non-Catholics. They do receive federal funds. Ought they to have to perform abortions, or give up their federal funds?

Bartner: Our view is that they should reflect the religious diversity of the student body and respect that diversity by providing those services to those students who so chose.

Johnson: That's a yes--they should have to provide abortions.

Bartner: That is a "yes."

Johnson: Now, why would the same not be true of the "Bloomington Catholic Hospital," if it has a teaching program that receives federal funds?

Bartner: The hospital would not be required to perform the abortions. If there is a health plan for the students and employees of that hospital, then that health plan would be required to provide that coverage--they could get abortions, off-site, for example. The only requirement is that the health plan must provide those services if they are not religiously exempt. But no one is forcing hospitals to perform abortions.

I can't speak for any individual organization or any individual hospital.

Johnson: Well, I understand, but we're just talking about general principles here. This [hypothetical] Catholic hospital, like Notre Dame University, admits non-Catholics, of course, just like Catholics. And they get federal funds, or at least they have a teaching program that ties them to a federally funded university, so they're covered by Title IX under this bill--everybody admits that. And you just said that they have to provide abortions under their student health plans. They have to pay for abortions, in other words, for their medical students and their nursing students, right?

Now, that's highly objectionable to every Catholic hospital in the United States. And they are going to fight this bill all the way, unless it is amended to be inapplicable to abortion.

Furthermore, it is nonsense to say, once the principle is established that it is "sex discrimination" for them [hospitals] not to pay for abortions for their employees, that they can then maintain that it's not "sex discrimination" if they don't provide abortions to the public.

****

Waldron: Doug, in our remaining minutes, help me understand what the Tauke/Sensenbrenner Amendment would accomplish. What would that do?

Johnson: Again, the root of the problem is the current federal sex discrimination law, which now equates abortion with "sex discrimination." As we've all agreed here today, the bill we're discussing, the Civil Rights Restoration Act, would expand this law to cover any hospital which has a teaching program--I'm talking about an intern, a resident, a nursing student.

Now, it follows very clearly and logically, according to the law professors and attorneys who we've consulted, that those hospitals are going to be guilty of "sex discrimination" if they refuse to provide abortions to the public. Now, there are thousands of hospitals in the United States which do not perform abortions.

Bartner: And that is not the interpretation of the vast majority of civil rights attorneys who've discussed this bill, or of the members of Congress who support this bill.

Johnson: Many of those are the same attorneys who will be filing the lawsuits against these universities and hospitals after this bill passes--just as has occurred with the state Equal Rights Amendments.

****

Johnson: Let's talk about the [Tauke/Sensenbrenner/Danforth] amendment, because we've only got a few minutes left. The amendment simply says that the federal sex discrimination law doesn't require or forbid anything with respect to abortion!

Bartner: Right.

Johnson: So it allows every college and every hospital to either provide or not provide abortions as it sees fit.

Bartner: And we believe that institutions which are not religiously exempted should be required to provide those things, because it's a legal service.

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Johnson: Well, I must say it's not at all surprising that the Religious Coalition for Abortion Rights doesn't want any amendments to this bill, since if it's passed without amendments it will be the most powerful [pro-abortion] legal weapon which has ever been created.

****

Exhibit 1

DRAFT

DATE 9/18/85 10:00

Approved by Board of Aldermen

EXHIBIT "A" TO BOARD BILL NO. 205

AGREEMENT

THIS AGREEMENT, made and entered into as of this _____ day of _____________, 1985, by and between THE CITY OF ST. LOUIS, MISSOURI (the "City"), and ST. LOUIS REGIONAL HEALTH CARE CORPORATION, a not-for-profit Missouri corporation (the "Corporation").

WITNESSETH:

WHEREAS, the Corporation is willing to acquire a hospital facility ("Corporation's hospital") and to operate and provide hospital and clinical services directly and through contractual relationships with other providers so long as the City pays a required portion of the costs of same; and

WHEREAS, the acquisition of Corporation's hospital and provision of such services are intended to maintain, and, if possible, improve the quality of care to be rendered to the medically indigent inhabitants of the St. Louis metropolitan region and the efficiency and economy of the delivery of such care; and

WHEREAS, the Corporation's hospital and its proposed services will provide medical care and treatment to the medically indigent inhabitants of the City and will be in furtherance of the City's obligations pursuant to Section 205.270 R.S.Mo. 1978; and

WHEREAS, the Corporation will require substantial funds to provide for the acquisition and renovation of Corporation's hospital and proposes to borrow such funds upon execution of this Agreement and a similar agreement with the County of St. Louis (the "County"); and

WHEREAS, Corporation intends to operate Corporation's hospital as a care-oriented hospital; and

WHEREAS, in consideration of the Corporation's provision of medical care to the medically indigent inhabitants of the City, the City believes it is in the public interest and for a public purpose to expend funds from tax revenues to apply toward a portion of the total costs and expenses of the Corporation's hospital and clinical services; and

WHEREAS, the Mayor and the Comptroller on behalf of the City of St. Louis, Missouri, are authorized by Ordinance __________, 1985 to enter into this Agreement; and

WHEREAS, the laws of the State of Missouri, including but not limited to Chapter 70 R.S.Mo. 1978, Chapter 205 R.S.Mo. 1978, Chapter 355 R.S.Mo. 1978, all as amended, and the Charter of the City of St. Louis, Missouri, authorize this agreement;

NOW, THEREFORE, IT IS AGREED:

1. The Corporation shall organize and capitalize a hospital facility and for this purpose acquire and renovate the property formerly known as Charter Hospital of St. Louis, located at 5535 Delmar Blvd. in the City of St. Louis. Corporation shall also obtain appropriate licenses and accreditation for the operation of Corporation's hospital and clinics all as

expeditiously as possible. Corporation shall not borrow in excess of Twenty Million Dollars ($20,000,000.00) exclusive of debt service reserves, for the purpose of acquisition, renovation, equipment related to renovation of hospital facilities and capitalized costs.

2. (a) Pursuant to Section 4 herein, the City shall make payment to the Corporation for services provided to the certified City patients according to the formula presented below. The formula shall be applied on an annual basis.

FORMULA

$$\frac{\text{Billed Charges on Certified City Patients}}{\text{Total Hospital Billed Charges}} \times (\text{Operating Expenses} - \text{Miscellaneous Revenues})$$

$$- \text{Patient Service Receipts for Certified City Patients} = \text{Payment}$$

For purposes of the formula the following definitions apply:

"Billed charges" represent the value of all acute hospital patient care (both routine and ancillary) services rendered to the patients at the full-established rates, disregarding amounts actually paid to the hospital by or on behalf of patients.

"Patient service receipts" are all amounts actually paid (cash basis) to the hospital by or on behalf of patients for services rendered.

"Miscellaneous revenue" is all revenue other than that directly associated with patient care excluding gifts and donations which are recorded as direct additions to fund balances in accordance with generally accepted accounting principles and investment income on funds designated by the Board of Directors for plant replacement and expansion funded depreciation. "Operating expenses" are all expenses associated with managing, operating, and maintaining the Corporation's hospital recorded in accordance with generally accepted accounting principles with the exception of:

1) interest on initial indebtedness described in Sections 1 and 2(b), and
2) malpractice payments in excess of malpractice insurance limits unless the requirements set forth below are met.

Malpractice payments in excess of malpractice insurance limits shall be included as operating expenses if the setting of malpractice insurance limits has been made by the Corporation with the independent consultation and advice of an independent person or firm chosen by the Corporation qualified to evaluate insurance needs and other areas of risk management for health care institutions, having a favorable reputation for skill and experience in such work, taking into account the availability of commercial insurance, the terms upon which such insurance is available and the cost of available insurance, and the effect of such terms and such cost upon the Corporation's cost and charges for its services.

It is the intention of the parties hereto that only certified City patients shall be provided services at

Corporation's hospital at City's expense. However, in the event patients who are residents of the City, but are not certified, are provided services by Corporation's hospital, such patients shall be included in the formula, as if they were certified City patients, and the City shall make payment to Corporation for such services. The County shall make payment to the Corporation for services to certified County patients on the same formula. If Operating Expenses exceed Patient Service Receipts and Miscellaneous Revenue, the City and County will each pay, in addition to payment required by the formula set forth above, 50% of such excess.

(b) Commencing no earlier than October 1, 1985, the City shall pay 50% of the principal and interest, respectively, paid by the Corporation with respect to initial indebtedness incurred for the acquisition, renovation, equipment related to renovation of the hospital facilities, and capitalized costs. The County shall pay the remaining 50%. City's payments for the principal and interest shall be made monthly based on at least a five year amortization. In the event that either the City or the County shall fail to pay timely its share of such principal and interest, (or any other financial obligation hereunder), the Corporation may, at its option, terminate the hospital's operations or cease to provide health care for the medically indigent inhabitants of either the City or County as the case may be, provided, however, that the non-defaulting party shall have the option to require the resignation of members of the Board of Directors and Board of Overseers appointed by the defaulting party and assume the Corporation's indebtedness, in which event the defaulting party shall have no further rights to use the Corporation's facilities hereunder.

(c) The care of the City's certified patients shall begin on October 1, 1985, unless otherwise agreed to by the parties. The services to be provided by Corporation to City's certified patients shall be those services designated by the Corporation's Board of Overseers, which Board is to be established by the Corporation's By-Laws and which shall consist of three appointees of the Mayor of the City, three appointees of the County Executive, and one joint appointee to serve as chairman; provided that the services to be provided to the patients of the City and the County shall not be substantially increased above the services designated as of the date of execution hereof without sixty days' advance written notice to the Corporation, and the Corporation's obligation to render such services at an increased level shall be subject to the suitability of the Corporation's facilities and the sufficiency of appropriated funds.

3. (a) The Corporation agrees to provide, and the City agrees to provide funds to defray its expense in so doing, the clinical care services as shall be designated in writing by the City, provided, that, absent such written designation on the clinical care services, the Corporation shall provide those clinical care services to the citizens of the City as was provided by the City on May 1, 1985. The written designation establishing the clinical care services shall remain in force

during the life of this Agreement but may be modified by the City upon sixty (60) days written notice being served as provided below to the Corporation or within such shorter period of time as mutually agreed to in writing. The Corporation recognizes that the City may from time-to-time designate additional sites and facilities for the delivery of clinical care and may also terminate the use of certain of the designated sites and facilities. The Corporation's obligation to render such clinical care services at a modified designation or at additional sites shall be subject to the suitability of the Corporation's facilities and the sufficiency of appropriated funds.

(b) Pursuant to Section 4 herein, the City shall provide funds necessary for defraying the operating deficit incurred as a result of organizing and operating the clinics and contracting with others to provide health related services to the medically indigent citizens of the City, including (i) the reasonable cost of organizing, managing, operating and maintaining the clinics and related services, including, without limitation, malpractice insurance; (ii) a reasonable fund for improvements, replacement, renewal and depreciation; (iii) maintenance of reasonable working capital reserves; and (iv) all principal and interest paid by the Corporation with respect to indebtedness incurred for the acquisition, equipping and renovation of clinical facilities and capitalized costs. The operating deficit shall be computed by adding the total cost of operating the clinics and subtracting all revenues of the Corporation, from whatever source derived and not previously included in paragraph 2(a) above, except those restricted grants or donations which do not increase, directly or indirectly, the cost of operating the clinics.

4. On or about ninety (90) days prior to the beginning of the City's fiscal year, the Corporation shall provide the City a good faith estimate of the amount required from City for the City's next fiscal year for the payment (i) under Section 2(a), (ii) clinic costs, (iii) the City's principal and interest payments, and (iv) maintenance by the Corporation of a reasonable working capital reserve to fund operations to be contributed by the City on a ratio of its total payment under Section 2(a) over the total amounts paid by the City and County for hospital services during the Corporation's fiscal year. Such estimated amount will be paid to the Corporation in twelve equal installments on the first business day of each month of the City's fiscal year.

In addition, the Corporation will request a maximum contingency reserve equal to fifteen percent (15%) of the aforesaid appropriation. Part or all of such contingency reserve will be paid to the Corporation only upon submission to the Comptroller of an explanation of the unanticipated expenditure required in excess of the aforesaid appropriations.

If the City shall fail to pay installments on such estimate in accordance herewith, or if the City shall fail, during its fiscal year, to appropriate the full amount so certified by the Corporation, the Corporation, at its option, may terminate the Corporation's hospital's operations or cease to provide health care for the City's medically indigent without penalty and the members of the Board of Directors not appointed by the City may require resignation of the City's representatives on the Board of Directors and Board of Overseers of the Corporation. The estimate to be provided to the City hereunder shall show the manner in which it was computed, and the basis for such computations.

Each year, within 120 days following the close of the Corporation's fiscal year the Corporation shall compute in accordance with generally accepted accounting principles actual payments due it from the City for such preceding fiscal year pursuant to the terms of Sections 2(a), 2(b) and 3(b). If the estimated payments made to the Corporation by the City during the Corporation's fiscal year (exclusive of the working capital reserve) exceeded the amount determined under the formulas set forth in Sections 2(a), 2(b) and 3(b), the Corporation shall account for such excess as an advance and will credit the City's next following monthly estimated payments. If the estimated payments made to the Corporation by the City during the Corporation's fiscal year (exclusive of the working capital reserve) and any payment from the contingency reserve were less than the amount determined under the formulas set forth in Sections 2(a), 2(b) and 3(b), the Corporation shall bill the City for such shortfall and the City shall pay such shortfall to the Corporation within 45 days subject to the terms and conditions of Section 5 hereof.

5. Payments by the City in accordance with the terms hereof are expressly recognized to be conditional upon the availability of funds appropriated in accordance with the provisions of the City Charter and ordinances; the obligations of the City hereunder shall not be construed as constituting an indebtedness of the City beyond available appropriations in any fiscal year; the failure of the City to appropriate an amount sufficient to pay the City's fiscal obligations as determined by Sections 2, 3 and 4 of this Agreement shall be grounds for avoidance of this Agreement by the Corporation, in accordance with Section 4 hereof, but shall not subject the City to liability for breach of contract or any other form of liability.

6. The Corporation will operate the Corporation's hospital and clinics in conformity with the laws of the State of Missouri, the regulations and standards of the Missouri Department of Health, and in general conformity with generally recognized medical standards. The corporation shall not provide directly or by contract induced abortion or abortion referrals, except when necessary to save the life of the mother to any authorized patients of the City or other non authorized patients of the City. No patient admitted to Corporation's hospital shall be deemed a "certified City patient" unless, prior to admission, the patient has been determined by City to be eligible for hospital services at City's expense. The Corporation shall have the right to render services to patients other than certified patients of the City and County so long as the rendering of such services to such patients shall not interfere with the ability of

the Corporation to discharge its obligation to supply services to those certified patients.

7. Within the availability of funds hereunder and consistent with the level of care specified in accordance herewith, the Corporation's hospital and clinics shall be operated by the Corporation in such manner as to provide directly, or (it being expressly recognized by the City that special services may be required for patients of the Corporation which either are not provided by the Corporation or are more efficiently provided by others) under contract with other community hospitals, hospital, medical, para-medical, nursing, educational, training, routine maintenance, housekeeping and other services of every kind and character for the treatment and care of the medically indigent inhabitants of the City, including all supplies and services necessary for such operation. The City covenants that for the term of this Agreement it shall not provide directly or by contract other or additional hospital services to the City's medically indigent inhabitants.

8. All contributions received on behalf of the Corporation and revenues derived from services performed by the Corporation's hospital or clinics or under contract with the Corporation from other community hospitals shall be and remain the sole property of the Corporation. The Corporation agrees that said revenues shall be used exclusively toward payment for the provision of Corporation's hospital or clinic facilities and services, provided that said revenues shall be applied to the appropriate service category, to wit, Corporation's hospital or

clinic services or any other service category provided by contract with another governmental agency or political subdivision of which the City, by signed receipt, is given notice. No contributions or grants shall be accepted by the Corporation, without the advance approval of the Board of Directors evidenced in the formal minutes of such Board.

9. The City shall not by virtue of this Agreement be deemed a partner or joint venturer with the Corporation or the County in the operation of Corporation's hospital or clinics or any other facility or activity encompassed by this Agreement. Furthermore, Corporation is an independent contractor under this Agreement and is not considered an agent or employee of the City. Any person induced by the Corporation to provide services at said hospital by Corporation shall be the employee and/or agent of Corporation and under Corporation's or its agent's exclusive control.

10. (a) Within 120 days after the end of each of Corporation's fiscal years following commencement of the hospital's and clinical operations, the Corporation shall furnish to the City a copy of the Corporation's financial statement audited by a firm of certified public accountants having a national reputation in the auditing of hospital accounts reflecting the financial condition of the Corporation.

(b) The City, on reasonable notice and at reasonable times during business hours, shall have full and complete access to all books and records of the Corporation, for the purpose of such audits or examinations of the operations of the Corporation as the City shall deem necessary for the purpose of reviewing or verifying financial matters.

11. Anything to the contrary herein notwithstanding, the Corporation shall have the undisturbed use, possession and operation of the Corporation's hospital and clinics for the purpose of providing hospital and clinical services thereat. The Corporation shall be solely responsible for the selection, retention and termination of its employees and contractors and their conduct and shall exercise separate and independent control over same; provided, however, that the selection of employees made by Corporation will attempt to achieve an initial work force for Corporation's hospital of one-third former City Hospital employees. Any employee at City Hospital at the time of execution of this Agreement shall be automatically included in the pool of employees eligible for employment by Corporation at Corporation's hospital unless the employee requests that he or she be excluded from the pool. Corporation shall endeavor to maintain a ratio of at least one-third City residents as its employees. Corporation agrees to make available to City information pertaining to personnel sufficient to verify the number of former City employees and then-current City residents employed at Corporation's hospital and their current positions within Corporation's hospital. The Corporation shall be solely responsible for making equipment choices, selecting vendors and setting insurance coverages. Further, the Corporation shall not succeed to any contractual or other obligation of the City with respect to its provision of hospital, clinical and related

services, and, to the extent permitted by law, the City does hereby indemnify and hold the Corporation harmless against any liability, cost or expense incurred by it as a result of claims made by City employees. The Corporation will not dispose of any substantial part of its capital assets other than in the ordinary course of business without the prior approval of the City.

12. This Agreement shall be in force and effect for a period of ten (10) years and three (3) months, beginning as of October 1, 1985, and ending December 31, 1995. The parties recognize that the operation of the Corporation's hospital, the care and treatment of patients thereat, the engaging of the services of personnel and other community hospitals to provide such care and treatment and orderly and efficient financial and other planning by the parties will require the parties to undertake financial and other commitments in advance of said expiration date. The parties therefore agree that either may extend this Agreement for an additional period of five years, beginning January 1, 1996, by giving notice of such extension to the other party not later than December 31, 1994. Any such extension shall, however, be subject to the provisions for the termination of this Agreement set out in paragraph 13 hereof.

13. From and after ten (10) years from January 1, 1986, this Agreement may be terminated by either party by giving notice of such termination to the other party not less than twelve months in advance of the date fixed for termination, which date shall be December 31 in the year for which termination is to be effective. Upon termination, in the event the City has paid

its fifty percent (50%) share of the initial indebtedness and upon request of the City, the Corporation shall convey an undivided interest to City in the hospital facilities as a tenant in common subject to any deed of trust on the hospital facilities, said interest being equal to the ratio of the sum of the payments made by the City on account of principal indebtedness of the Corporation divided by the fair market value of said facilities at the date of termination. Nonetheless, it is understood the Corporation is a not-for-profit organization and it will consider giving the facilities to the City.

14. Notices required hereunder shall be served on the parties as follows: in the case of the City, by delivering same to the office of the Mayor, City Hall, St. Louis, Missouri, 63103; in the case of the Corporation, by delivering same to the Corporation's registered agent and to the Corporation's agent in charge of its hospital. References to actions to be taken by the City shall be construed to comprehend actions taken by officers of the City designated in writing by the Mayor to act in the City's behalf for purposes of this Agreement.

15. The Corporation shall not discriminate in any manner in providing service or in any of its operations to the extent the same are financed by City on the basis of race, color, creed, handicap, age, religion, national origin or sex.

16. The St. Louis Regional Health Care Corporation shall not perform or provide, either directly or by contract, induced abortions or abortion referral services, except when necessary to save the life of the mother, to any patient

regardless of whether said patient is a "certified City patient" or a non-certified patient.

17. No service offered or provided by the St. Louis Regional Health Care Corporation, either directly or by contract, shall be denied to any resident of the City of St. Louis because of, or on the basis of, the inability of said resident to pay for such service pursuant to the terms of this Agreement.

18. In the event the Corporation shall enter into any agreement or amendment to an agreement with any political subdivision to provide hospital care for any person the Corporation shall first give sixty (60) days advance written notice to the City and provide the City with a copy of the proposed contract or agreement together with such notice. In the event such proposed agreement or amendment to an agreement contains terms and conditions which could be made applicable to the City, the City may, at its option, notify the Corporation that those terms and conditions shall be included herein and upon the giving of such notice by the City, the terms and conditions of any such contract or agreement with any other political subdivision, designated by the City, shall be deemed included herein and the provisions of this Agreement, shall be amended accordingly. To the extent the Corporation's lenders require subordination during the term of this Agreement, the City agrees this Agreement shall be subordinate and junior to the lien of the deeds of trust and mortgages on the Corporation's facilities securing the Corporation's lenders.

19. (a) The Corporation shall, in addition to its covenants in Section 1 hereof, enter into leases for such clinical sites and facilities as provided for in this Agreement.

(b) In the event that the Board of Overseers is either not established as provided for in Section 2(c) or fails to establish a level of service as provided therein, the Corporation shall, in that event, provide those services as was provided to the City's medically indigent as of May 1, 1985, until such time as the Board of Overseers fulfills its responsibility thereunder.

(c) In the event that no such officer or officers are designated in accordance with Section 14, references to actions to be taken by the City shall be construed as referring to action of the City's Board of Estimate and Apportionment.

20. (a) Until the Corporation executes a similar agreement with the County, the City agrees to the following additional terms:

1) The City shall pay 100% of the principal and interest paid by the Corporation with respect to initial indebtedness as provided for in Section 2(b) and 100% of the expenses incurred under Section 2(a), provided that, in the event the County subsequently enters into an agreement with the Corporation the County shall pay an amount equal to fifty percent (50%) of the initial indebtedness. Of that 50%, an amount equal to that amount theretofore paid by the City on account of initial indebtedness shall be paid by

the County; thereafter, payments by the City and County shall be equal until the indebtedness is retired.

2) The Board of Overseers shall consist entirely of appointees of the Mayor of the City and shall function as provided for in the Corporation's By-laws and Section 2(c) of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the date and year first above written.

CITY OF ST. LOUIS, MISSOURI

ATTEST:

Mayor

Register

Comptroller

APPROVED AS TO FORM:

City Counselor

ST. LOUIS REGIONAL HEALTH CARE CORPORATION

By:

By:

ATTEST:

By:
Secretary

EXHIBIT 2

Ordinance 59532
COMMITTEE SUBSTITUTE FOR BOARD BILL NO. 205

An ordinance authorizing and directing the Mayor and the Comptroller to enter into a contract with the St. Louis Regional Health Care Corporation for the provision of acute care and clinical health care services and an option contract, restricting the provision of abortions by said Corporation, prohibiting discrimination on the basis of ability to pay for such services with an emergency clause.

BE IT ORDAINED BY THE CITY OF ST. LOUIS, AS FOLLOWS:

Section One. The Mayor and the Comptroller of the City of St. Louis are hereby authorized and directed to enter into a contract by and between the City of St. Louis and the St. Louis Regional Health Care Corporation for the provision of acute care and clinical health care services in a form substantially as provided in Exhibit A, a copy of which is attached hereto and incorporated by this reference as if fully set out, and an option contract for the purchase of real property and improvements in a form substantially as provided in Exhibit B, a copy of which is attached hereto and incorporated by this reference as if fully set out.

Section Two. The St. Louis Regional Health Care Corporation shall not perform or provide, either directly or by contract, induced abortions or abortion referral services, except when necessary to save the life of the mother, to any patient regardless of whether said patient is a "certified City patient" or a non-certified patient.

The Mayor and the Comptroller are not authorized to enter into any contract with the St. Louis Regional Health Care Corporation which does not contain the first paragraph of this section as a legally binding restriction on the operation of the Corporation.

Section Three. No service offered or provided by the St. Louis Regional Health Care Corporation, either directly or by contract, shall be denied to any resident of the City of St. Louis because of, or on the basis of, the inability of said resident to pay for such service pursuant to the terms of the Agreement.

Section Four. This being an ordinance for the preservation of public peace, health and safety, it is hereby declared to be an emergency measure within the meaning of Sections 19 and 20 of Article IV of the Charter of the City of St. Louis and therefore this ordinance shall become effective immediately upon its passage and approval by the Mayor.

EXHIBIT "A" TO
BOARD BILL NO. 205

AGREEMENT

THIS AGREEMENT, made and entered into as of this _________ day of _____________, 1985, by and between THE CITY OF ST. LOUIS, MISSOURI (the "City"), and ST. LOUIS REGIONAL HEALTH CARE CORPORATION, a not-for-profit Missouri corporation (the "Corporation").

WITNESSETH:

WHEREAS, the Corporation is willing to acquire a hospital facility ("Corporation's hospital") and to operate and provide hospital and clinical services directly and through contractual relationships with other providers so long as the City pays a required portion of the costs of same; and

WHEREAS, the acquisition of Corporation's hospital and provision of such services are intended to maintain, and, if possible, improve the quality of care to be rendered to the medically indigent inhabitants of the St. Louis metropolitan region and the efficiency and economy of the delivery of such care; and

WHEREAS, the Corporation's hospital and its proposed services will provide medical care and treatment to the medically indigent inhabitants of the City and will be in furtherance of the City's obligations pursuant to Section 205.270 R.S.Mo. 1978; and

WHEREAS, the Corporation will require substantial funds to provide for the acquisition and renovation of Corporation's hospital and proposes to borrow such funds upon execution of this Agreement and a similar agreement with the County of St. Louis (the "County"); and

WHEREAS, Corporation intends to operate Corporation's hospital as a care-oriented hospital; and

WHEREAS, in consideration of the Corporation's provision of medical care to the medically indigent inhabitants of the City, the City believes it is in the public interest and for a public purpose to expend funds from tax revenues to apply toward a portion of the total costs and expenses of the Corporation's hospital and clinical services; and

WHEREAS, the Mayor and the Comptroller on behalf of the City of St. Louis, Missouri, are authorized by Ordinance ________, 1985 to enter into this Agreement; and

WHEREAS, the laws of the State of Missouri, including but not limited to Chapter 70 R.S.Mo. 1978, Chapter 205 R.S.Mo. 1978, Chapter 355 R.S.Mo. 1978, all as amended, and the Charter of the City of St. Louis, Missouri, authorize this agreement;

NOW, THEREFORE, IT IS AGREED:

1. The Corporation shall organize and capitalize a hospital facility and for this purpose acquire and renovate the property formerly known as Charter Hospital of St. Louis, located at 5535 Delmar Blvd. in the City of St. Louis. Corporation shall also obtain appropriate licenses and accreditation for the operation of Corporation's hospital and clinics all as expeditiously as possible. Corporation shall not borrow in excess of Twenty Million Dollars ($20,000,000.00) exclusive of debt service reserves, for the purpose of acquisition, renovation, equipment related to renovation of hospital facilities and capitalized costs.

2. (a) Pursuant to Section 4 herein, the City shall make payment to the Corporation for services provided to the certified City patients according to the formula presented below. The formula shall be applied on an annual basis.

FORMULA

$$\frac{\text{Billed Charges on Certified City Patients}}{\text{Total Hospital Billed Charges}} \times \left(\text{Operating Expenses} - \text{Miscellaneous Revenues}\right)$$

$$- \text{Patient Service Receipts for Certifified City Patients} = \text{Payment}$$

For purposes of the formula the following definitions apply:

"Billed charges" represent the value of all acute hospital patient care (both routine and ancillary) services rendered to the patients at the full-established rates, disregarding amounts actually paid to the hospital by or on behalf of patients.

"Patient service receipts" are all amounts actually paid (cash basis) to the hospital by or on behalf of patients for services rendered.

"Miscellaneous revenue" is all revenue other than that directly associated with patient care excluding gifts and donations which are recorded as direct additions to fund balances in accordance with generally accepted accounting principles and investment income on funds designated by the Board of Directors for plant replacement and expansion funded depreciation.

"Operating expenses" are all expenses associated with managing, operating, and maintaining the Corporation's hospital recorded in accordance with generally accepted accounting principles with the exception of:

1) interest on initial indebtedness described in Sections 1 and 2(b), and

2) malpractice payments in excess of malpractice insurance limits unless the requirements set forth below are met.

Malpractice payments in excess of malpractice insurance limits shall be included as operating expenses if the setting of malpractice insurance limits has been made by the Corporation with the independent consultation and advice of an independent person or firm chosen by the Corporation qualified to evaluate insurance needs and other areas of risk management for health care institutions, having a favorable reputation for skill and experience in such work, taking into account the availability of commercial insurance, the terms upon which such insurance is available and the cost of available insurance, and the effect of such terms and such cost upon the Corporation's cost and charges for its services.

It is the intention of the parties hereto that only certified City patients shall be provided services at Corporation's hospital at City's expense. However, in the event patients who are residents of the City, but are not certified, are provided services by Corporation's hospital, such patients shall be included in the formula, as if they were certified City patients, and the City shall make payment to Corporation for such services. The County shall make payment to the Corporation for services to certified County patients on the same formula. If Operating Expenses exceed Patient Service Receipts and Miscellaneous Revenue, the City and County will each pay, in addition to payment required by the formula set forth above, 50% of such excess.

(b) Commencing no earlier than October 1, 1985, the City shall pay 50% of the principal and interest, respectively, paid by the Corporation with respect to initial indebtedness incurred for the acquisition, renovation, equipment related to renovation of the hospital facilities, and capitalized costs. The County shall pay the remaining 50%. City's payments for the principal and interest shall be made monthly based on at least a five year amortization. In the event that either the City or the County shall fail to pay timely its share of such principal and interest, (or any other financial obligation hereunder), the Corporation may, at its option, terminate the hospital's operation or cease to provide health care for the medically indigent inhabitants of either the City or County as the case may be, provided, however, that the non-defaulting party shall have the option to require the resignation of members of the Board of Directors and Board of Overseers appointed by the defaulting party and assume the Corporation's indebtedness, in which event the defaulting party shall have no further rights to use the Corporation's facilities hereunder.

(c) The care of the City's certified patients shall begin on October 1, 1985, unless otherwise agreed to by the parties. The services to be provided by Corporation to City's certified patients shall be those services designated by the Corporation's Board of Overseers, which Board is to be established by the Corporation's By-Laws and which shall consist of three appointees of the Mayor of the City, three appointees of the County Executive, and one joint appointee to serve as chairman; provided that the services to be provided to the patients of the City and the County shall not be substantially increased above the services designated as of the date of execution hereof without sixty days' advance written notice to the Corporation, and the Corporation's obligation to render such services at an increased level shall be subject to the suitability of the Corporation's facilities and the sufficiency of appropriated funds.

3. (a) The Corporation agrees to provide, and the City agrees to provide funds to defray its expense in so doing, and clinical care services as shall be designated in writing by the City, provided, that, absent such written designation on the clinical care services, the Corporation shall provide those clinical care services to the citizens of the City as was provided by the City on May 1, 1985. The written designation establishing the clinical care services shall remain in force during the life of this Agreement but may be modified by the City upon sixty (60) days written notice being served as provided below to the Corporation or within such shorter period of time as mutually agreed to in writing. The Corporation recognizes that the City may from time-to-time designate additional sites and facilities for the delivery of clinical care and may also terminate the use of certain of the designated sites and facilities. The Corporation's obligation to render such clinical care services at a modified designation or at additional sites shall be subject to the suitability of the Corporation's facilities and the sufficiency of appropriated funds.

(b) Pursuant to Section 4 herein, the City shall provide funds necessary for defraying the operating deficit incurred as a result of organizing and operating the clinics and contracting with others to provide health related services to the medically indigent citizens of the City, including (i) the reasonable cost of organizing, managing, operating and maintaining the clinics and related services, including, without limitation, malpractice insurance; (ii) a reasonable fund for improvements, replacement, renewal and depreciation; (iii) maintenance of reasonable working capital reserves; and (iv) all principal and interest paid by the Corporation with respect to indebtedness incurred for the acquisition, equipping and renovation of clinical facilities and capitalized costs. The operating deficit shall be computed by adding the total cost of operating the clinics and subtracting all revenues of the Corporation, from whatever source derived and not previously included in paragraph 2(a) above, except those restricted grants or donations which do not increase, directly or indirectly, the cost of operating the clinics.

4. On or about ninety (90) days prior to the beginning of the City's fiscal year, the Corporation shall provide the City a good faith estimate of the amount required from City for the City's next fiscal year for the payment (i) under Section 2(a), (ii) clinic costs, (iii) the City's principal and interest payments, and (iv) maintenance by the Corporation of a reasonable working capital reserve to fund operations to be contributed by the City on a ratio of its total payment under Section 2(a) over the total amounts paid by the City and County for hospital services during the Corporation's fiscal year. Such estimated amount will be paid to the Corporation in twelve equal installments on the first business day of each month of the City's fiscal year.

In addition, the Corporation will request a maximum contingency reserve equal to fifteen percent (15%) of the aforesaid appropriation. Part or all of such contingency reserve will be paid to the Corporation only upon submission to the Comptroller of an explanation of the unanticipated expenditure required in excess of the aforesaid appropriations.

If the City shall fail to pay installments on such estimate in accordance herewith, or if the City shall fail, during its fiscal year, to appropriate the full amount so certified by the Corporation, the Corporation, at its option, may terminate the Corporation's hospital's operations or cease to provide health care for the City's medically indigent without penalty and the members of the Board of Directors not appointed by the City may require resignation of the City's representatives on the Board of Directors and Board of Overseers of the Corporation. The estimate to be provided to the City hereunder shall show the manner in which it was computed, and the basis for such computations.

Each year, within 120 days following the close of the Corporation's fiscal year the Corporation shall compute in accordance with generally accepted accounting principles actual payments due it from the City for such preceding fiscal year pursuant to the terms of Sections 2(a), 2(b) and 3(b). If the estimated payments made to the Corporation by the City during the Corporation's fiscal year (exclusive of the working capital reserve) exceeded the amount determined under the formulas set forth in Sections 2(a), 2(b) and 3(b), the Corporation shall account for such excess as an advance and will credit the City's next following monthly estimated payments. If the estimated payments made to the Corporation by the City during the Corporation's fiscal year (exclusive of the working capital reserve) and any payment from the contingency reserve were less than the amount determined under the formulas set forth in Sections 2(a), 2(b) and 3(b), the Corporation shall bill the City for such shortfall and the City shall pay such shortfall to the Corporation within 45 days subject to the terms and conditons of Section 5 hereof.

5. Payments by the City in accordance with the terms hereof are expressly recognized to be conditional upon the availability of funds appropriated in accordance with the provisions of the City Charter and ordinances; the obligations of the City hereunder shall not be construed as constituting an indebtedness of the City beyond available appropriations in any fiscal year; the failure of the City to appropriate an amount sufficient to pay the City's fiscal obligations as determined by Sections 2, 3 and 4 of this Agreement shall be grounds for avoidance of this Agreement by the Corporation, in accordance with Section 4 hereof, but shall not subject the City to liability for breach of contract or any other form of liability.

6. The Corporation will operate the Corporation's hospital and clinics in conformity with the laws of the State of Missouri, the regulations and standards of the Missouri Department of Health, and in general conformity with generally recognized medical standards. The corporation shall not provide directly or by contract induced abortion or abortion referrals, except when necessary to save the life of the mother to any authorized patients of the City or other non authorized patients of the City. No patient admitted to Corporation's hospital shall be deemed a "certified City patient" unless, prior to admission, the patient has been determined by City to be eligible for hospital services at City's expense. The Corporation shall have the right to render services to patients other than certified patients of the City and County so long as the rendering of such services to such patients shall not interfere with the ability of the Corporation to discharge its obligation to supply services to those certified patients.

7. Within the availability of funds hereunder and consistent with the level of care specified in accordance herewith, the Corporation's hospital and clinics shall be operated by the Corporation in such manner as to provide directly, or (it being expressly recognized by the City that special services may be required for patients of the Corporation which either are not provided by the Corporation or are more efficiently provided by others) under contract with other community hospitals, hospital, medical, para-medical, nursing, educational, training, routine maintenance, housekeeping and other services of every kind and character for the treatment and care of the medically indigent inhabitants of the City, including all supplies and services necessary for such operation. The City covenants that for the term of this Agreement it shall not provide directly or by contract other or additional hospital services to the City's medically indigent inhabitants.

8. All contributions received on behalf of the Corporation's and revenues derived from services performed by the Corporation's hospital or clinics or under contract with the Corporation from other community hospitals shall be and remain the sole property of the Corporation. The Corporation agrees that said revenues shall be used exclusively toward payment for the provision of Corporation's hospital or clinic facilities and services, provided that said revenues shall be applied to the appropriate service category, to wit, Corp-

oration's hospital or clinic services or any other service category provided by contract with another governmental agency or political subdivision of which the City, by signed receipt, is given notice. No contributions or grants shall be accepted by the Corporation, without the advance approval of the Board of Directors evidenced in the formal minutes of such Board.

9. The City shall not by virtue of this Agreement be deemed a partner or joint venturer with the Corporation or the County in the operation of Corporation's hospital or clinics or any other facility or activity encompassed by this Agreement. Furthermore, Corporation is an independent contractor under this Agreement and is not considered an agent or employee of the City. Any person induced by the Corporation to provide services at said hospital by Corporation shall be the employee and/or agent of Corporation and under Corporation's or its agent's exclusive control.

10. (a) Within 120 days after the end of each of Corporation's fiscal years following commencement of the hospital's and clinical operations, the Corporation shall furnish to the City a copy of the Corporation's financial statement audited by a firm of certified public accountants having a national reputation in the auditing of hospital accounts reflecting the financial condition of the Corporation.

(b) The City, on reasonable notice and at reasonable times during business hours, shall have full and complete access to all books and records of the Corporation, for the purpose of such audits or examinations of the operations of the Corporation as the City shall deem necessary for the purpose of reviewing or verifying financial matters.

11. Anything to the contrary herein notwithstanding, the Corporation shall have the undisturbed use, possession and operation of the Corporation's hospital and clinics for the purpose of providing hospital and clinical services thereat. The Corporation shall be solely responsible for the selection, retention and termination of its employees and contractors and their conduct and shall exercise separate and independent control over same; provided, however, that the selection of employees made by Corporation will attempt to achieve an initial work force for Corporation's hospital of one-third former City Hospital employees. Any employee at City Hospital at the time of execution of this Agreement shall be automatically included in the pool of employees eligible for employment by Corporation at Corporation's hospital unless the employee requests that he or she be excluded from the pool. Corporation shall endeavor to maintain a ratio of at least one-third City residents as its employees. Corporation agrees to make available to City information pertaining to personnel sufficient to verify the number of former City employees and then-current City residents employed at Corporation's hospital and their current positions within Corporation's hospital. The Corporation shall be solely responsible for making equipment choices, selecting vendors and setting insurance coverages. Further, the Corporation shall not succeed to any contractual or other obligation of the City with respect to its provision of hospital, clinical and related services, and, to the extent permitted by law, the City does hereby indemnify and hold the Corporation harmless against any liability, cost or expense incurred by it as a result of claims made by City employees. The Corporation will not dispose of any substantial part of its capital assets other than in the ordinary course of business without the prior approval of the City.

12. This Agreement shall be in force and effect for a period of ten (10) years and three (3) months, beginning as of October 1, 1985, and ending December 31, 1995. The parties recognize that the operation of the Corporation's hospital, the care and treatment of patients thereat, the engaging of the services of personnel and other community hospitals to provide such care and treatment and orderly and efficient financial and other planning by the parties will require the parties to undertake financial and other commitments in advance of said expiration date. The parties there-

fore agree that either may extend this Agreement for an additional period of five years, beginning January 1, 1996, by giving notice of such extension to the other party not later than December 31, 1994. Any such extension shall, however, be subject to the provisons for the termination of this Agreement set out in paragraph 13 hereof.

13. From and after ten (10) years from January 1, 1986, this Agreement may be terminated by either party by giving notice of such termination to the other party not less than twelve months in advance of the date fixed for termination, which date shall be December 31 in the year for which termination is to be effective. Upon termination, in the event the City has paid its fifty percent (50%) share of the initial indebtedness and upon request of the City, the Corporation shall convey an undivided interest to City in the hospital facilities as a tenant in common subject to any deed of trust on the hospital facilities, said interest being equal to the ratio of the sum of the payments made by the City on account of principal indebtedness of the Corporation divided by the fair market value of said facilities at the date of termination. Nonetheless, it is understood the Corporation is a not-for-profit organization and it will consider giving the facilities to the City.

14. Notices required hereunder shall be served on the parties as follows: in the case of the City, by delivering same to the office of the Mayor, City Hall, St. Louis, Missouri, 63103; in the case of the Corporation, by delivering same to the Corporation's registered agent and to the Corporation's agent in chargeof its hospital. References to actions to be taken by the City shall be construed to comprehend actions taken by officers of the City designated in writing by the Mayor to act in the City's behalf for purposes of this Agreement.

15. The Corporation shall not discriminate in any manner in providing service or in any of its operations to the extent the same are financed by City on the basis of race, color, creed, handicap, age, religion, national origin or sex.

16. The St. Louis Regional Health Care Corporation shall not perform or provide, either directly or by contract, induced abortions or abortion referral services, except when necessary to save the life of the mother, to any patient regardless of whether said patient is a "certified City patient" or a non-certified patient.

17. No service offered or provided by the St. Louis Regional Health Care Corporation, either directly or by contract, shall be denied to any resident of the City of St. Louis because of, or on the basis of, the inability of said resident to pay for such service pursuant to the terms of this Agreement.

18. In the event the Corporation shall enter into any agreement or amendment to an agrement with any political subdivision to provide hospital care for any person the Corporation shall first give sixty (60) days advance written notice to the City and provide the City with a copy of the proposed contract or agreement together with such notice. In the event such proposed agreement or amendment to an agreement contains terms and conditions which could be made applicable to the City, the City may, at its option, notify the Corporation that those terms and conditions shall be included herein and upon the giving of such notice by the City, the terms and conditions of any such contract or agreement with any other political subdivision, designated by the City, shall be deemed included herein and the provisions of this Agreement, shall be amended accordingly. To the extent the Corporation's lenders require subordination during the term of this Agreement, the City agrees this Agreement shall be subordinate and junior to the lien of the deeds of trust and mortgages on the Corporation's facilities securing the Corporation's lenders.

19. (a) The Corporation shall, in addition to its covenants in Section 1 hereof, enter into leases for such clinical sites and facilities as provided for in this Agreement.

(b) In the event that the Board of Overseers is either not established as provided for in Section 2(c) or fails to establish a level of service as provided therein, the Corporation shall, in that event, provide those services as was provided to the City's medically indigent as of May 1, 1985, until such time as the Board of Overseers fulfills its responsibility thereunder.

(c) In the event that no such officer or officers are designated in accordance with Section 14, references to actions to be taken by the City shall be construed as referring to action of the City's Board of Estimate and Apportionment.

20. (a) Until the Corporation executes a similar agreement with the County, the City agrees to the following additional terms:

1) The City shall pay 100% of the principal and interest paid by the Corporation with respect to initial indebtedness as provided for in Section 2(b) and 100% of the expenses incurred under Section 2(a), provided that, in the event the County subsequently enters into an agreement with the Corporation the County shall pay an amount equal to fifty percent (50%) of the initial indebtedness. Of that 50%, an amount equal to that amount theretofore paid by the City on account of initial indebtedness shall be paid by the County; thereafter, payments by the City and County shall be equal until the indebtedness is retired.

2) The Board of Overseers shall consist entirely of appointees of the Mayor of the City and shall function as provided for in the Corporation's By-laws and Section 2(c) of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the date and year first above written.

CITY OF ST. LOUIS, MISSOURI

____
Mayor

____
Comptroller

ATTEST:

____
Register

APPROVED AS TO FORM:

____
City Counselor

ST. LOUIS REGIONAL HEALTH CARE CORPORATION

By: __________________________

By: __________________________

ATTEST:

By: __________________________
Secretary

EXHIBIT B

OPTION CONTRACT

The undersigned in consideration of Ten and no/100 Dollars paid, gives to THE CITY OF ST. LOUIS, MISSOURI (the "City") an option to purchase the entire property formerly known as Charter Hospital of St. Louis, known and described as 5535 Delmar Boulevard in the City of St. Louis, including all improvements located thereon and owned by the undersigned seller (all such property being hereafter referred to as the "Property"), all subject to the terms of the Special Agreements to the Option Contract attached hereto as Schedules One and Two and which are hereby incorporated herein.

The total price shall be determined pursuant to the terms of the Special Agreements to the Option Contract attached hereto as Schedule Two and hereby incorporated herein by reference and shall be payable as provided in the said Special Agreements to the Option Contract attached hereto as Schedule Two.

This option is to continue for the period set forth in the Special Agreements to Option Contract attached hereto as Schedule Two and if not exercised within that period the option money is to be retained by seller and option to be null and void. If option is exercised, the sale is to be closed within 90 days thereafter at a mutually agreeable location in the City of St. Louis, Missouri, under the usual Sale Conditions and Closing Practices, and subject to any special agreements between seller and purschaser, all set forth in Schedule One hereof and hereby made part of this contract.

The rights conveyed herein to purchaser are superior to those granted by the second sentence of Section 13 of that certain Agreement between Seller and the City dated ____ ____________, 1985 (the "Agreement").

All adjustments referred to in Schedule One hereof to be made as of the date of closing.

Date (purchaser) ____________, 19____
The City of St. Louis, Missouri

____
Purchaser

____
Mayor

____
Comptroller

____
Register

Approved as to Form:

____
City Counselor

Date (seller) ________________, 19____
St. Louis Regional Health Care Corporation

____
Seller

By ____________________________

Attest:

____

SALE CONDITIONS AND CLOSING PRACTICES

At election of either seller or purchaser, and at such party's expense, sale may be closed in escrow department of the local office of any reputable title company, but terms of contract shall not be affected.

general taxes based on latest available assessment and rate, subdivision upkeep assessments, interest, insurance premiums, water rates, sewer service charge, gas and electric bills, fuel supply and operating expenses (if any) to be prorated and adjusted as provided on the basis of 30 days to the month, seller to have last day; general tax year to run from January 1st; Purchaser to pay all recording fees.

Seller shall furnish special warranty deed, subject to deed restrictions, easements, rights-of-way of record, and zoning regulations; also subject to leases and to occupancy of tenants existing on the date contract is executed by purchaser; general taxes payable in current year and thereafter, and special taxes assessed or becoming a lien after date contract is executed by purchaser; said general and special taxes to be assumed and paid by purchaser. All personal property and fixtures included in this sale is guaranteed by seller to be paid for in full.

Title shall be merchantable, or purchaser will accept title insurance policy issued by qualified title insurance company in lieu of strictly merchantable title. If title is merchantable, purchaser shall pay for certificate of title; if title is found imperfect and seller cannot perfect title or obtain title insurance policy as above provided within 60 days after date fixed for closing, earnest deposit shall be returned to purchaser and seller shall pay to agent the sale commission and other costs including title charges. Seller shall pay for doumentary stamps.

If, after contract is executed, the premises be destroyed or damaged by fire, windstorm or otherwise, seller shall restore same within thirty days if possible and sale closing date shall be extended accordingly, but otherwise purchaser shall have option of cancelling or enforcing contract; if enforced, purchaser shall be entitled to insurance; if cancelled, earnest deposit shall be returned to purchaser. In either event agent shall receive full sale commission. Seller shall assume risk of such destruction or damage and shall have the obligation to obtain consent of insurance companies to sale contract.

If improvements or additions have been completed within six months prior to sale closing date, seller shall furnish reasonable security against mechanics' liens or satisfactory evidence of payment of bills.

Property to be accepted in its present condition unless otherwise stated in contract. Seller warrants that he has not received any written notification from any governmental agency requiring any repairs, replacements, or alterations to said premises which have not been satisfactorily made. This is the entire contract and neither party shall be bound by representation as to value or otherwise unless set forth in contract.

The words purchaser, seller, agent and deposit where appearing in this contract shall be construed in the plural, if more than one.

This contract shall bind the heirs, legal representatives, successors and assigns of the parties hereto.

Contract is not assignable by purchaser, without consent of seller.

Schedule One

SCHEDULE TWO

Special Agreements to Option Contract

1. Seller has agreed to purchase the Property from Charter Hospital of St. Louis, Inc. ("Charter") and the Option granted hereunder is expressly conditional on the consummation of the transactions contemplated under such purchase agreement.

2. This Option shall commence on the date hereof and shall continue during the entire term of that certain Agreement between Seller and the City dated ________________, 1985 (the "Agreement"), as such may be extended. During the term of this Option, so long as the City is not in default under the Agreement, the City may exercise its Option aforesaid upon ninety days prior written notice to Seller by payment as hereinafter provided, to wit:

A. If the option is exercised prior to December 31, 1986, the purchase price shall be the sum of twenty-two million dollars or an amount equal to the pro rata interest so conveyed times the purchase price.

B. If option is exercised on or after December 31, 1986, an amount equal to the greater of

(i) The fair market value of the Property as of date of such notice as determined by an independent appraiser reasonably acceptable to Seller, less all principal payments made by Purchaser prior to the date of closing under this Option on all loans and obligations of Seller incurred or assumed by Seller in connection with the purchase and renovation of the Property, as provided in the Agreement or an amount equal to the pro rata interest so conveyed times the purchase price; or

(ii) The principal balances as of the date of closing under this Option on all outstanding loans and obligations of Seller incurred or assumed by Seller in connection with the purchase, renovation of and improvements to, the Property, or an amount equal to the pro rata interest so conveyed times the purchase price.

3. Following the closing of the Option provided hereunder, the City shall have no further obligation under Section 2(b) of the Agreement for the payment of principal and interest of the loans and obligations of Seller incurred or assumed by Seller in connection with the purchase and renovation of the Property, and the Agreement shall otherwise remain in full force and effect upon

payment by Seller to the City of a yearly rental equal to One Dollar ($1.00) per year.

4. If upon expiration of the Agreement all of the loans and obligations of Seller incurred or assumed by Seller in connection with the purchase and renovation of the Property shall be paid in full, the City shall have the further option of purchasing the entire interest in the Property then owned by Seller, if any, for a price equal to the then fair market value of such undivided interest as determined by an independent appraiser reasonably acceptable to Seller, payable in cash at closing. A similar extension of an option is required to be made by Seller to the County of St. Louis, Missouri (the "County"). If within 90 days of the expiration of the Agreement the County exercises its option to purchase then each of the City and County shall purchase 50% of the remaining interest of Seller. If the County does not exercise its option, the City shall have the option to purchase the entire Property for the then fair market value thereof as determined by an independent appraiser reasonably acceptable to Seller, payable in cash at closing. Such further options, if exercised by the City hereunder, shall be subject to the same terms and conditions herein contained.

5. It is agreed that the County shall have the right to retain at least a 50% undivided ownership interest in the Property until the expiration of the Agreement and the exercise or failure to exercise of the rights provided in its agreement with the Seller and in paragraph 4 of this Schedule Two. The City's right to exercise its option to purchase the entire Property is conditioned upon the City providing the County and the Seller written notice of its intention to exercise the Option thirty days prior to exercise provided in paragraph 2 of this Schedule Two in which event the County has the right, within said thirty days, to notify the City and the Seller it reserves its right to purchase a 50% undivided interest, in which event the City may within said thirty days purchase only a 50% undivided ownership interest in the Property.

Approved: September 19, 1985

EXHIBIT 3

according to the correct age of the insured, the coverage provided by the policy would not have become effective, or would have ceased prior to the acceptance of such premium or premiums, then the liability of the insurer shall be limited to the refund, upon request, of all premiums paid for the period not covered by the policy.
(L. 1959 H.B. 272 § 8)

376.790. Limits on applicability of law.—Nothing in sections 376.770 to 376.800 shall apply to or affect (1) any policy of workers' compensation insurance or any policy of liability insurance with or without supplementary expense coverage therein; or (2) any policy or contract of reinsurance; or (3) any blanket or group policy of insurance; or (4) life insurance endowment or annuity contracts or contracts supplemental thereto which contain only such provisions relating to accident and sickness insurance as (a) provide additional benefits in case of death or dismemberment or loss of sight by accident, or as (b) operate to safeguard such contracts against lapse, or to give a special surrender value or special benefit or an annuity in the event that the insured or annuitant shall become totally and permanently disabled, as defined by the contract or supplemental contract.
(L. 1959 H.B. 272 § 9)

376.800. Misrepresentation made in obtaining individual accident and health policy no defense, exception.—Anything in the law to the contrary notwithstanding, no misrepresentation made in obtaining or securing a policy of insurance covered by sections 376.770 to 376.800 shall be deemed material or render the policy void, or constitute a defense to a claim thereunder unless the matter misrepresented shall have actually contributed to the contingency or event on which any claim thereunder is to become due and payable, and whether it so contributed in any case shall be a question for the jury.
(L. 1967 p. [illegible] § 1)

376.805. Elective abortion to be by optional rider and requires additional premium—elective abortion defined.—1. No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium. For purposes of this section, an "**elective abortion**" means an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed.

2. This section shall be applicable to all contracts, plans or policies of:

(1) All health insurers subject to this chapter; and

(2) All nonprofit hospital, medical, surgical, dental, and health service corporations subject to chapter 354, RSMo; and

(3) All health maintenance organizations.

3. This section shall be applicable only to contracts, plans or policies written, issued, renewed or revised, after September 28, 1983. For the purposes of this subsection, if new premiums are charged for a contract, plan or policy, it shall be determined to be a new contract, plan or policy.
(L. 1983 S.B. 227 § 1)

MEDICARE SUPPLEMENT INSURANCE

376.850. Law, how cited.—Sections 376.850 to 376.883 may be cited as the "Missouri Medicare Supplement Insurance Act".
(L. 1981 S.B. [illegible] § 1)
Effective [illegible]

376.855. Definitions.—1. As used in sections 376.850 to 376.883, the following terms shall mean:

(1) "**Certificate**", a certificate issued under a group medicare supplement policy, which policy has been delivered, or issued for delivery, in this state;

(2) "**Director**", the director of the division of insurance;

(3) "**Medicare**", the Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965, as amended;

(4) "**Medicare supplement policy**", a group or individual policy of accident and health insurance, or a subscriber contract of health service corporations, which is designed primarily to supplement coverage for hospital, medical, or surgical expenses incurred by an insured person which are not covered by medicare. This term does not include:

(a) A policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations; or

(b) A policy or contract of any professional, trade, or occupational association for its members or former or retired members, or combination thereof, if such association:

a. Is composed of individuals all of whom are actively engaged in the same profession, trade, or occupation;

b. Has been maintained in good faith for purposes other than obtaining insurance; and

Final

Exhibit 4

PHYSICIAN AGREEMENT

This Physician Agreement is entered into this _____ day of _____, 1986, by and between St. Louis Regional Professional Services Corporation, a Missouri not-for-profit corporation, (hereinafter "PSC") and ____________________, a _________ , duly licensed by the State of Missouri (hereinafter "Physician").

RECITALS

WHEREAS, PSC has entered into an agreement with St. Louis Regional Health Care Corporation (hereinafter "Regional"), under which PSC agrees to provide professional services at Regional's acute health care facilities including St. Louis Regional Medical Center (hereinafter the "Medical Center"), and its ambulatory care centers (hereinafter the "Clinics") and such other facilities Regional may designate from time to time, (hereinafter collectively referred to as the "Hospital"); and

WHEREAS, the parties hereto are mutually desirous of establishing an affiliation which will deliver high quality medical professional services and supply skilled personnel to the Hospital and enhance the teaching programs of the Hospital.

NOW, THEREFORE, in consideration of the premises and the mutual promises herein contained, the parties hereto agree as follows:

1. Physician shall pursuant to the terms and conditions of this Agreement, render inpatient and/or outpatient medical services to patients on behalf of PSC, as set forth in Exhibit A which is attached hereto and incorporated herein by reference, and PSC shall pursuant to the terms and conditions of this Agreement pay Physician for such services as set forth in said Exhibit A.

2. Physician and PSC further agree to be bound by the terms, conditions and provisions set forth in Exhibit B which is titled "Physician - PSC Terms and Conditions" and is incorporated herein by reference.

3. Each Exhibit referred to as being incorporated by reference herein shall be a part of this Agreement.

IN WITNESS WHEREOF, PSC has executed this Agreement as of the dy and year first above written.

ST. LOUIS REGIONAL PROFESSIONAL
SERVICES CORPORATION

By: ______________________
John H. Kissel, M.D.

PHYSICIAN

______________________, M.D.

EXHIBIT B

PHYSICIAN - PSC TERMS AND CONDITIONS

ARTICLE I

DEFINITIONS AND PURPOSES

1.1. Chief of Service. A member of the Medical Staff who is appointed by Regional pursuant to the Bylaws of the Medical Staff to serve as the Chief of a Service. All Chiefs of a Service shall be required to execute a Physician Agreement with PSC either individually or through a Physician Group.

1.2. Service. A group of Qualified Physicians organized by clinical specialty into a department, established by the Bylaws of the Medical Staff or into a division of such a department.

1.3. Medical Staff. The Medical Staff of St. Louis Regional Medical Center.

1.4. PSC Base Income. Payments by Regional to PSC pursuant to the Hospital Agreement.

1.5. Professional Fees. Except as otherwise provided, all fees generated by a Qualified Physician as a result of patient care activities provided under the Agreement, fees generated by a Qualified Physician while using any facility owned or operated by Regional, fees generated by a Qualified Physician for services provided to individuals presenting themselves for care at the Hospital and any other fee included in the Agreement. PSC Base Income shall not be included.

1.6. Qualified Physician. A doctor of medicine, doctor of osteopathy, dentist or podiatrist licensed to practice in the State of Missouri who is a member in good standing of the Medical Staff. Also included are residents who have temporary licenses to practice medicine in the State of Missouri.

1.7. Master Agreement. The agreement between Regional and PSC dated July 1, 1986.

1.8. Physician Group. A group of Qualified Physicians or other entity employing or otherwise providing Qualified Physicians.

1.9. Purposes. The purposes of the parties in entering into the Agreement include the following:

(a) improving and developing the quality of patient care and medical education at the Hospital;

(b) assisting the Hospital in maintaining a high degree of excellence in the pursuit of patient care and medical education;

(c) advancing patient care, teaching, and research at the Hospital and other affiliated health care institutions;

(d) ensuring the provision of medical care to all persons at the Hospital regardless of their ability to pay;

(e) promoting high quality medical care and other human services for the benefit of persons suffering from illness and for the benefit of the sick and injured generally;

(f) taking an active part in planning for and promoting the general mental and physical health of the community; and

(g) providing for a responsive and cost effective administrative organization and information system as a means of ensuring high quality management and accountability in the accomplishment of the aforesaid purposes.

The parties to the Agreement acknowledge that cooperation, good faith and understanding are essential to the accomplishment of the foregoing purposes. Accordingly, each party to the Agreement covenants to comply in good faith with the terms and spirit of the Agreement and to maintain a level of understanding and professionalism consistent with the purposes of the Agreement and their respective roles under the Agreement.

ARTICLE II

RESPONSIBILITIES OF THE PARTIES

2.1. Duties. Physician shall pursuant to the terms and conditions of the Agreement render inpatient and/or outpatient medical services to patients on behalf of PBC, as set forth in Exhibit A to the Agreement. Physician shall also perform such administrative and educational duties as he may be directed from time to time.

2.2. Physician Qualifications. Physician covenants that he is duly licensed by the State of Missouri and is and shall remain a member in good standing of the Medical Staff. Physician shall not under any circumstances be considered an employee of PSC or Regional.

2.3. Compliance with Laws. Physician agrees to abide by: the requirements and recommendations of the Joint Commission on Accreditation of Hospitals ("JCAH") with respect to the completion of medical records, participation in quality assurance activities of PSC and Regional and any other JCAH requirement or recommendation regarding the provision of medical services by Physician; the Bylaws, policies and procedures of Regional as they pertain to performance by Physician under the Agreement; the Bylaws and Rules and Regulations of the Medical Staff; the Bylaws, policies and procedures of PSC; and any other federal, state, county or municipal law, rule, ordinance or regulation and all generally recognized standards and policies applicable to his rendering of professional services under the Agreement.

2.4. Work Scheduling. The Medical Director of the Medical Center shall have the ultimate authority to assign Services and to schedule working hours, vacation time and other leaves of absence of Physician. All schedules shall be discussed with Physician and the applicable Chief of Service prior to being effective. The requests and suggestions of Physician and the Chief of Service shall be given due consideration by the Medical Director.

2.5. Records. Physician shall prepare and maintain such records relating to the services provided under the Agreement in the manner and form as prescribed from time to time by PSC or Regional. All records, including but not limited to medical records, prepared by or used by Physician pursuant to the Agreement shall be the property of Regional. Physician shall cooperate with and assist other members of the Medical Staff in preparing clinical reports, use reasonable efforts to elevate the standing of the Medical Staff in the field of medical science, perform Medical Staff committee duties, be available for medical consultations as needed, participate as necessary in scientific programs conducted as functions of the Medical Staff and assist in the training of appropriate personnel of Regional working at the Hospital.

2.6. Other Activities. Physician may, subject to the provisions of the Agreement or as authorized by the Medical Director of the Medical Center and the Chief of Service, provide professional and other services outside of the Hospital as are appropriate; provided, however, that no outside activity shall limit, interfere or otherwise affect Physician's obligations under the Agreement. Physician may, with the consent of the Medical Director of the Medical Center and the

Chief of Service, conduct research financed from sources other than PSC or Regional.

2.7. Confidentiality. Physician shall maintain the confidentiality of patients and their medical records. Physician may, however, within the usual and customary practice, present or publish cases and professional experiences as a result of the Agreement.

2.8. Right to Refuse Services. PSC reserves the right to refuse the services offered under the Agreement by Physician upon the occurrence of any of the following events:

(a) Any request pursuant to the Bylaws, Rules and Regulations of the Medical Staff for corrective action against Physician;

(b) Any summary suspension of Physician's clinical privileges pursuant to the Bylaws, Rules and Regulations of the Medical Staff;

(c) Any automatic suspension of Physician's privileges pursuant to the Bylaws, rules and Regulations of the Medical Staff; or

(d) Failure or refusal of Physician to comply with the laws, regulations or ordinances applicable to the provision of services under the Agreement by Physician.

2.9 Right to Refuse Payment. Upon the occurrence of an event listed in Paragraph 2.8 of this Exhibit, PSC shall continue to pay Physician; however, payment to Physician shall cease pending a final decision by the Board of Direqtors of Regional if:

(i) in the case of corrective action or automatic suspension, the Medical Review Committee of the Medical Staff makes an adverse determination; or

(ii) in the case of a summary suspension, the executive committee of the Medical Staff makes an adverse determination.

Where the final decision of the Board of Directors of Regional is to either revoke or suspend Physician's clinical privileges or membership on the Medical Staff, PSC's obligation to pay Physician is extinguished until such revocation or suspension has terminated. Where the final decision of the Board of Directors of Regional is to reduce or otherwise condition the clinical privileges granted Physician, an appropriate reduction in the payment to Physician shall be made.

2.10. Documentation. Medical records of discharged patients shall be completed within thirty (30) days following discharge. A medical record shall be considered complete when the required contents, including any required clinical resumé or final progress note, are assembled and authenticated, all final diagnoses and complications are recorded without the use of symbols or abbreviations and all physician attestations, verifications or other physician information necessary for the

Hospital to receive reimbursement have been included. Physician shall be delinquent when at the end of a month the number of his medical records that are incomplete more than thirty (30) days following discharge exceeds one half (1/2) the number of his discharges during the previous month. In the event Physician is delinquent, PSC may, at PSC's option, withhold all payments under the Agreement to Physician for the month until the delinquent medical records are completed.

2.11. Facilities and Services Provided to Physician. PSC shall work with Regional to insure that Physician is furnished adequate space, facilities, support staff, equipment and any expendable supplies necessary for Physician to fulfill his obligations under the Agreement. Such space, facilities, support staff and expendable supplies shall include, but are not limited to:

* adequate space in the Hospital for Physician to provide patient care;
* all expendable supplies and equipment necessary for Physician to provide patient care;
* nursing staff and other allied health professionals necessary for Physician to provide patient care;
* janitorial, security, standard hospital telephone, laundry and utilities;
* a medical library; and
* a medical records department that shall be responsible for insuring that medical records are available on a timely basis for physician notations and that notes are transcribed in the medical records promptly following dictation.

Regional's compliance with this paragraph 2.11 shall be determined using the standards promulgated by the Missouri hospital licensing authority, the conditions of participation of the Medicare and Medicaid Programs and the standards of the JCAH. The parties recognize that Regional's ability to comply with this Paragraph 2.11 is subject to the availability of appropriations from St. Louis County ("County") and St. Louis City ("City") and Regional reserves the right to refuse a particular request by PSC if any such request would be contrary to applicable local, state or federal laws or regulations, would be contrary to an established policy of the Hospital, is outside of the appropriations from the County or the City, or is determined to be unreasonable by Regional.

The space, facilities, support staff, equipment and expendable supplies furnished under the Agreement by Regional shall be used by Physician solely in accordance with the terms of the Agreement.

ARTICLE III

REMUNERATION

3.1. Remuneration to Physician. The amount in Exhibit A, attached to the Agreement, shall be in lieu of collections for professional services and compensation for administrative and teaching services and shall constitute payment in full to Physician for the twelve (12) month period commencing July 1, 1986 through June 30, 1987, or any pro rata portion thereof from the effective date of the Agreement through June 30, 1987. PSC shall remit payments to Physician on a monthly basis, in accordance with the amount stated in Exhibit A, payable by the 15th day of each succeeding month. Physician shall be eligible to receive an Incentive Payment in the manner and amount determined by PSC and Regional; provided, however, the total payment to Physician hereunder shall be reasonable and any Incentive Payment shall accrue at the time the professional service is rendered.

3.2. Professional Fees. Physician consents to, authorizes and designates PSC as its sole agent to prepare statements, keep books and accounts and collect all Professional Fees generated by Physician. Physician shall have no interest in any Professional Fee whether collected or uncollected and any right to bill or receive directly or indirectly any Professional Fee is hereby waived by Physician. Physician shall execute whatever documentation is necessary to permit PSC to bill and collect Professional Fees.

3.3. Fee Schedule. Except as authorized by PSC, all Professional Fees of Physician shall be charged in accordance with the fee schedule established by PSC and Regional as amended from time to time.

3.4. Charity Care. Physician shall comply with the policies of Regional and PSC with regard to the billing and collection of Professional Fees, the provision of charity care and the acceptance of third party payors.

3.5. Benefits. Physician, at his option, may participate in the group health, life and dental programs available at Regional.

ARTICLE IV

TERMINATION

4.1. Term and Termination. Except as otherwise provided, the Agreement shall remain in force from the date executed until midnight on June 30, 1987, and shall automatically renew for successive one (1) year terms.

4.2. Voluntary Termination. Either party may terminate the Agreement provided written notice of the intent to terminate the Agreement is given at least three (3) months prior to the termination date.

4.3. Involuntary Termination. (a) PSC may, at its option, either suspend its performance under the Agreement or terminate the Agreement without notice upon occurrence of one of the following events:

(i) a material breach by Physician of any term, condition or covenant of the Agreement and such breach continues thirty (30) days following notice from PSC to cure;

(ii) failure of Physician to maintain membership on the Medical Staff;

(iii) failure of Physician to maintain any required license or other qualification to provide professional services;

(iv) failure of Physician to be insurable under the professional liability policy maintained under the Agreement;

(v) cessation of PSC's operations;

(vi) termination of the Master Agreement or Hospital Agreement between PSC and Regional; or

(vii) failure of Physician to comply with any of the terms and conditions of the Agreement, Bylaws, or Regulations and/or policies and procedures of Regional or PSC.

(b) Physician may at his option, either suspend his performance thereunder or terminate the Agreement if PSC breaches any material term or condition of the Agreement, and such breach continues for thirty (30) days following written notice from Physician to cure.

4.4. Mutual Agreement. The Agreement may be terminated at any time by mutual agreement of the parties.

4.5. Obligations Upon Termination.

(a) Termination of the Agreement shall extinguish all obligations of PSC to Physician. Physician shall, however, be entitled to receive any payment accruing prior to the date of termination.

(b) Any property belonging to PSC or Regional under the custody or control of Physician shall be returned to PSC or Regional, as the case may be, within ten (10) days of termination.

(c) Physician agrees to cooperate with PSC and Regional to provide continued treatment for all patients.

ARTICLE V

MISCELLANEOUS

5.1. Independent Contractors. Nothing in the Agreement is intended to create nor shall it be deemed or construed to create any partnership or other relationship between PSC, Physician or Regional other than that of independent contracting entities. Neither PSC, Physician, or Regional nor any of their respective employees or agents, shall be construed to be the agent, employee or representative of the other.

5.2. Notice. Any notice required or permitted to be given pursuant to the Agreement shall be in writing and shall be sent by certified or registered mail, return receipt requested as follows:

To PSC:

St. Louis Regional Professional Services Corporation
John H. Kissel, M.D.
President
5535 Delmar Boulevard
St. Louis, Missouri 63112

To PHYSICIAN:

The address set forth in Exhibit A
to the Agreement

To REGIONAL:

St. Louis Regional Health Care Corporation
Mr. Robert B. Johnson
President and Chief Executive Officer
5535 Delmar Boulevard
St. Louis, Missouri 63112

5.3. Assignment. The Agreement shall not be assigned without the prior written consent of both parties hereto.

5.4. Modifications. The Agreement constitutes the entire agreement between the parties hereto and no changes, alterations or amendments shall be effective unless agreed to in writing by both parties.

5.5. Renegotiation. In the event of action by any level of government, court or by any political subdivision which materially modifies, changes, amends or alters the rights of the parties to the Agreement, renegotiation of the Agreement shall occur in light of such amendment, modification, alteration or change promulgated by such governmental authority upon notice by either party. If the Agreement is not amended in writing within a reasonable time after said notice was given, either party may terminate the Agreement upon thirty (30) days' notice to the other party.

5.6. Publicity. PSC and Physician agree to cooperate with each other regarding the release of public information concerning the Agreement and to the extent reasonable shall provide each other an opportunity to review any such information prior to release or publication.

5.7. Access To Books and Records.

(a) PSC. For the purpose of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any written regulations thereto, PSC agrees to comply with the following statutory requirements governing the maintenance of documentation to verify the cost of services rendered under the Agreement:

(i) until the expiration of four (4) years after the furnishing of such services pursuant to the Agreement, PSC shall make available upon written request, to the Secretary of the Department of Health and Human Services or upon request, to the Comptroller General of the United States or any of their duly authorized representatives, the Agreement and the books, documents and records of PSC that are necessary to certify the nature and extent of such costs, and

(ii) if PSC carries out any of the duties of the Agreement through a subcontract, with a value or cost of $10,000 or more over a 12-month period with a related organization, such subcontract shall contain a clause to the effect that until the expiration of four (4) years after the furnishing of such services pursuant to such subcontract, the related organization shall make available upon written request, to the

Secretary or upon request, to the Comptroller General or any of their duly authorized representatives, the subcontract and the books, documents and records of such organization that are necessary to verify the nature and extent of such costs.

(b) Physician. For the purpose of implementing Section 1861(v)(1)(I) of the Social Security Act, as amended, and any written regulations thereto, Physician agrees to comply with the following statutory requirements governing the maintenance of documentation to verify the cost of services rendered under the Agreement:

(i) until the expiration of four (4) years after the furnishing of such services pursuant to the Agreement, Physician shall make available upon written request, to the Secretary of the Department of Health and Human Services or upon request, to the Comptroller General of the United States or any of their duly authorized representatives, the Agreement and the books, documents and records of Physician that are necessary to certify the nature and extent of such costs, and

(ii) if Physician carries out any of the duties of the Agreement through a subcontract with a value or cost of $10,000 or more over a 12-month period with a related organization, such subcontract shall contain a clause to the effect that until the expiration of four (4) years after the furnishing of such services pursuant to such subcontract, the related organization shall make available upon written request, to the Secretary or upon request, to the Comptroller General or any of their duly authorized representatives, the subcontract and the books, documents and records of such organization that are necessary to verify the nature and extent of such costs.

5.8. Insurance. PSC or Regional shall provide and maintain throughout the term of the Agreement, at its sole expense, professional liability insurance for Physician to protect against any and all liability, losses, damages, claims, causes of action, costs or expenses (including reasonable attorneys' fees), which directly or indirectly arise out of performance of duties by Physician under the Agreement. Such insurance shall be in form and amounts satisfactory to Physician. Any change in amount or form shall be immediately communicated to Physician.

5.9. Worker's Compensation Insurance. Physician shall obtain and maintain worker's compensation insurance coverage for any employee of Physician and shall provide PSC a certificate of insurance evidencing such coverage. In the event Physician fails to obtain or maintain insurance required hereunder in accordance with this Paragraph 5.9, PSC, at its option, may procure and/or renew such insurance to the account of Physician. If PSC does so procure and/or renew such insurance, Physician shall reimburse PSC for the cost thereof within thirty (30) days after written notice of such action is given by PSC to Physician. If Physician fails to reimburse PSC, PSC may deduct the cost of said insurance from any payment due Physician under the Agreement.

5.10. Indemnification.

(a) PSC hereby indemnifies and holds Physician harmless from and against any and all liability, losses, damages, claims, causes of action, costs or expenses (including reasonable attorneys' fees), which directly or indirectly arise out of the negligent performance under the Agreement by PSC or its employees.

(b) Physician agrees to indemnify and hold harmless PSC, Regional, and PSC's and Regional's agents, representatives, employees, successors and assigns from and against any and all claims, demands, damages, liability or causes of action of any kind whatsoever, whether arisen, arising or to arise in the future from, or directly or indirectly related to, property damage, death or personal injury proximately caused by the acts or omissions of Physician or his agents, representatives or employees.

5.11. Alteration of Premises. Physician shall not make or suffer to be made any substantial alterations of the premises provided under the Agreement or any part thereof, without prior written consent of Regional, and any additions to or alterations of said premises, except movable furniture and trade fixtures, shall become at once a part of the realty and belong to Regional.

5.12. Ownership of Research. The work product and results of any research in which Physician participates or conducts pursuant to the Agreement shall be and remain the exclusive property of Regional and upon termination of the Agreement any and all of the foregoing items still in Physician's possession or control shall be delivered to Regional forthwith.

5.13. Entire Agreement. The Physician Agreement contains the entire agreement of the parties thereto and supersedes all prior agreements, representations and understandings, whether written or otherwise, between the parties relating to the subject matter thereof. The parties acknowledge the existence of a Master Agreement between Regional and PSC dated July 1, 1986. The express terms of the Physician Agreement shall prevail with respect to any subject matter addressed by the Physician Agreement and any subject matter not expressly addressed by the Physician Agreement shall be governed by the Master Agreement. The Physician Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

5.14. Litigation. In the event of any litigation by either party to enforce or defend its rights under the Agreement, the prevailing party, in addition to all other relief awarded by the court, shall be entitled to reasonable attorneys' fees.

5.15. Saving Clause. If any provision of the Agreement shall be held invalid, illegal or unenforceable by a court of competent jurisdiction, the remaining provisions thereof shall not in any way be affected or impaired thereby. Further, should any provision in the Agreement be reformed or rewritten by any judicial body, such provision as rewritten shall be binding upon the parties thereto.

5.16. Time of Essence. Time is of the essence with respect to every term and condition of the Agreement in which time is a factor.

5.17. Waiver of Breach. The waiver by either party of any breach under the Agreement shall in no way constitute a waiver of any subsequent breach of any term or condition thereof.

5.18. Non Competition. As a material inducement for PSC to enter into the Agreement, Physician agrees that during the term of the Agreement and any renewal thereof:

(a) Physician will not enter into any agreement or arrangement with any other hospital to provide similar professional services without the prior written consent of PSC and Regional; and

(b) Physician will not directly or indirectly own, operate, manage, be employed by or be contracted with any non-hospital based entity or organization which provides similar and/or competitive services, without the prior written consent of PSC and Regional.

5.19. Transfers of Patients. Physician shall base his decisions concerning the transfer of patients from the Medical Center or the Clinics to other treatment facilities only on medical considerations.

5.20. Medical Staff Membership. The parties acknowledge that Physician may have privileges at the Clinics but is not a member of the Medical Staff. It is understood that Physician shall apply for Medical Staff membership upon execution of the Agreement and, subject to any required amendments to the Medical Staff Bylaws, Rules and Regulations and the policies of Regional, shall become a member of the Medical Staff. Until Physician becomes a member of the Medical Staff, any reference in the Agreement to Medical Staff membership shall not apply.

5.21. Applicable Law. The Agreement shall be governed by and construed in accordance with the laws of the State of Missouri.

St. Louis Regional
Medical Center
5535 Delmar Boulevard
St. Louis, Missouri 63112
Telephone (314) 361-1212
Robert B. Johnson
Chief Executive Officer

March 17, 1987

The Honorable Edward M. Kennedy
Chairman, U.S. Senate
Committee on Labor and Human Resources
430 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I am writing to you to express my concern about the possible impact of S. 557, "The Civil Rights Restoration Act of 1987" on St. Louis Regional Medical Center, specifically the provision that would classify prohibition against performing abortions in hospitals that receive federal funds for educational purposes as sex discrimination. St. Louis Regional Medical Center is a 300 bed private not for profit hospital, that was established in June 1985 to replace St. Louis City Hospital and St. Louis County Hospital. Through a contract with the City of St. Louis and St. Louis County, we provide care to medically indigent residents. Over fifty percent of our operating revenues come directly from local government.

The contracts we have with the City of St. Louis and St. Louis County specifically prohibit us from performing or providing, either directly or by contract, induced abortions or abortion referral services; except when necessary to save the life of the mother.

We currently secure our physician services through contracts with Washington University and St. Luke's Hospitals for interns, residents and attending physicians. We could not provide care to the large medically indigent population we serve without the post graduate medical education programs we operate.

It is my understanding that the Tauke/Sensenbrenner Amendment, H.R.700/S.431 would restore Title IX to its original abortion-neutral condition. I would strongly urge your support of this amendment so that we are not placed in a position of either violating the law or the contract we have. Either violation would render us financially insolvent, therefore unable to meet the health care needs of a large indigent population.

Thanks very much for your consideration.

Sincerely,

Robert B. Johnson
Chief Executive Officer

RBJ/gv

cc: Senator John Danforth
Senator Christopher Bond

Providing Quality Medical and Health Care Services.
Owned and Operated by a Not For Profit Corporation.

Ms. JAMES. Mr. Chairman, I am here today to testify in opposition to Senate Bill 557, the so-called "Civil Rights Restoration Act", in its current form.

My organization takes this position because this bill would impose an unprecedented mandatory proabortion policy on thousands of hospitals and universities, unless it is amended in a manner which I will describe.

National Right to Life has not been alone in recognizing the sweeping proabortion implications of this bill. The U.S. Catholic Conference, the National Association of Evangelicals, and many other prolife organizations have raised the same objections and supported the same remedy, which is the so-called Tauke-Sensenbrenner amendment.

If this amendment is added to the bill, it would prevent the proabortion legal effects which I will describe and the National Right to Life Committee would withdraw its opposition to the Restoration Act.

Mr. Chairman, among the supporters of the Restoration Act are certain proabortion advocacy groups which want to put a legal gun to the institutional heads of colleges and hospitals. They want to say that if you take Federal funds, even indirectly, then you must involve yourself in abortion.

These proabortion groups are trying to ride piggyback on a popular bill. Proponents of the bill are telling you that the bill has nothing to do with abortion. But the abortion-related ramifications of this bill are very obvious, once you look behind the misleading slogans about this being "just a simple Restoration Act."

Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex" in federally funded educational programs. Beginning in 1975, the administrative agencies responsible for enforcing title IX have promulgated and enforced regulations which in essence say that it is a form of sex discrimination to treat abortion differently from other medical services or temporary disabilities.

This proabortion interpretation of title IX is glaringly inconsistent with overall Federal policy on abortion. Beginning in 1976, Congress has approved the "Hyde amendment" and many similar provisions which reflect the view of Congress and of most Americans, that abortion is not to be regarded as just "another medical procedure."

So Congress has decided that Federal funds are not to be used to fund abortions, except to save the life of a mother. But under title IX, as interpreted and enforced, public and private educational programs can be forced to fund abortion. What could be more absurd?

We strongly object to the mandatory proabortion policy embodied in the title IX regulations. What is even more significant, however, is the legal doctrine which these regulations embody—the legal doctrine that treating abortion differently from ordinary medical procedures is a form of discrimination on the basis of sex. That is a doctrine which has often been forcefully advocated in Congress and in the courts by the Women's Legal Defense Fund, the American Civil Liberties Union, the National Organization for Women, and other organizations which support this bill.

They won a great victory on the day that the Federal bureaucrats incorporated that legal doctrine into title IX. Thus, these groups have established in title IX in a legal beachhead, an enclave in Federal law in which failure to provide abortions is deemed to be illegal sex discrimination. They do not want to give that up.

On the contrary, they see the Civil Rights Restoration Act as a vehicle to expand the reach and the impact of the legal doctrine one hundred fold. Under this bill, title IX would be used as a legal hammer against hospitals with prolife policies.

Mr. Chairman, who is kidding whom? The President of the National Organization for Women recently charged that we at National Right to Life are seeking to interject the abortion issue into Congressional debate on all bills dealing with "sex discrimination."

But we all know that the proabortion, feminist legal advocacy groups believe that restricting women's access to abortion is indeed a form of sex discrimination. We all know that the feminist legal defense funds would be in court in a minute to defend the title IX abortion regulations if the administration tried to repeal them without congressional action. We all know that the feminist lobbies scuttled the Civil Rights Restoration Act in the House during the 99th Congress, rather than permit it to pass with the Tauke-Sensenbrenner amendment attached.

It made sense for them to kill the bill, from their perspective, because they have a lot at stake here. The Civil Rights Restoration Act would transform title IX into a powerful legal weapon to further their goal of forcing all important institutions within this society to embrace abortion. And that is what this fight is really.

There are many hundreds, perhaps thousands, of hospitals in this country which do not perform abortions, or which perform them only under extreme circumstances. These prolife policies may be based on prolife community sentiment, opposition to abortion by staff nurses or other members of the staff, or perhaps for other reasons. Many, but by no means all, of the prolife hospitals are identified with religious traditions which oppose abortion. Very few, however, are legally "controlled by" church officials. And only institutions which are "controlled by" a religious organization are legally entitled to claim the protection of the religious tenets exemption in title IX.

We have consulted leading legal specialists in abortion law and sex discrimination law. They tell us that the effect of the Restoration Act will be to require all teaching hospitals to provide abortion on demand to the general public.

Mr. Chairman, when I was in my teens, this committee and the Congress approved civil rights legislation which was worthy of the name—legislation intended to ensure that all Americans would be regarded with equal dignity under our system of law, such as title VI of the Civil Rights Act of 1964. I hope that the day will come when some of those groups which support the Restoration Act for reasons unrelated to abortion will tell the militant proabortion groups to carry their own water.

It really does grieve and anger me to see organizations such as the National Organization for Women seeking to covertly advance a proabortion agenda by piggybacking on civil rights legislation. In so doing, they debase the term "civil rights."

Mr. Chairman, we are all for civil rights, properly so-called. But there are many of us who do not think that opposing abortion is a form of sex discrimination.

I thank the committee for this opportunity.

[The prepared statement of Ms. James and responses to questions submitted by Senator Hatch follow:]

Testimony of
Kay Coles James
Director of Public Affairs
National Right to Life Committee
on
Abortion-Related Ramifications of S. 557,
The "Civil Rights Restoration Act"
Before The
Committee on Labor and Human Resources
United States Senate
March 19, 1987

Mr. Chairman, distinguished members of the Committee, my name is Kay Coles James. I am Director of Public Affairs for the National Right to Life Committee, and president of Black Americans for Life, which is an outreach project of the National Right to Life Committee.

The National Right to Life Committee (NRLC) is the nation's largest non-sectarian pro-life organization. NRLC represents 50 state right-to-life organizations and some 2,500 local right-to-life chapters.

At the outset, Mr. Chairman, I ask that my entire written statement be entered in the hearing record. I also ask that a National Right to Life legislative factsheet and three legal memoranda be entered into the hearing record as extensions of my testimony, as I will have barely have time to touch on many important points during my oral testimony.

Mr. Chairman, I am here today to testify in opposition to S. 557, the so-called "Civil Rights Restoration Act," in its current form. We take this position because this bill would impose an unprecedented mandatory pro-abortion policy on thousands of hospitals and universities, unless it is amended in a manner which I will describe.

NRLC has not been alone in recognizing the sweeping pro-abortion implications of this bill. The U.S. Catholic Conference, the National Association of Evangelicals, and many other pro-life organizations have raised the same objections, and supported the same remedy. Spokespersons for an increasingly number of hospitals which do not perform abortions are also being heard from on this matter.

Mr. Chairman, among the supporters of the "Restoration Act" are certain pro-abortion advocacy groups which want to put a legal gun to the institutional heads of colleges and hospitals. They want to say that if you take federal funds, even indirectly, then you must involve yourself in abortion.

They want to force institutions which would not voluntarily provide abortions. And they hope to accomplish all of this under the banner of "civil rights." We say, what about the civil rights of those who don't want anything to do with abortion?

These pro-abortion groups are trying to ride piggyback on a popular bill. Yet proponents of the bill are telling you that the bill has nothing to do with abortion. They claim that abortion is a "manufactured issue," put forward by shadowy right-wing forces which are really opposed to all civil rights laws.

Mr. Chairman, NRLC is opposed to this bill solely because of its pro-abortion ramifications. If the bill is amended to insure that teaching hospitals and other teaching inscitutions are not required to provide abortion-related services, NRLC will withdraw our opposition to the bill, as we have publicly stated countless times over the past two years.

One prominent sponsor of the House version of the "Restoration Act" recently severely criticized pro-life critics of the bill for, as she put it, holding the bill hostage. She told the Associated Press that "abortion has no place in a discussion about Title IX."

The Member of Congress who made that remark was being disingenuous, if not downright silly. She knows full well--just as every distinguished member of this committee knows--that it is impossible, in legal terms, to discuss Title IX without discussing abortion, because abortion has been "read into" Title IX for 12 years. That means that when you expand Title IX coverage, you expand mandatory abortion coverage.

Mr. Chairman, I think its time for the supporters of this bill to stop their doubletalk and lay their cards on the table.

I hope that this committee, and the full Senate, and the House, will debate on the merits the pro-abortion policy which this bill will expand. I'd like to hear those who think that pro-life hospitals and colleges should be exposed to sex-discrimination lawsuits, openly defend that as public policy. And we on the pro-life side will explain why we think it is bad public policy.

But everybody knows that Congress would not approve such a mandatory abortion policy if it were openly presented in a freestanding bill. And that is why those who have used Title IX as a pro-abortion legal weapon don't want Congress to look at what the "Restoration Act" means with respect to abortion. So, they just repeat their magic chant. "It's just a simple restoration act, it's just a simple restoration act. If you're really for civil rights, you won't support substantive amendments to this simple restoration act."

But the abortion-related ramifications are very obvious, once you look behind the misleading slogans about this being "just a simple restoration act."

Title IX prohibits discrimination "on the basis of sex" in federally funded educational programs. Beginning in 1975, the administrative agencies responsible for enforcing Title IX have promulgated and enforced regulations which in essence say that it is a form of sex discrimination to treat abortion differently from other "medical services" or "temporary disabilities" (34 C.F.R. Pts. 106.39, 106.40, 106.57).

This pro-abortion interpretation of Title IX is glaringly inconsistent with overall federal policy on abortion. Beginning in 1976, Congress has approved the Hyde Amendment and many similar provisions, which reflect the view of Congress (and of most Americans) that abortion is not to be regarded as just another "medical procedure."

So, Congress has decided that federal funds are not to be used to fund abortions, except to save the life of the mother. But under Title IX, as interpreted and enforced, public and private educational programs can be forced to fund abortions. What could be more absurd?

ABORTION AND SEX DISCRIMINATION

We strongly object to the mandatory pro-abortion policy embodied in the Title IX regulations. What is even more significant, however, is the legal doctrine which those regulations embody: the legal doctrine that treating abortion differently from ordinary medical procedures is a form of discrimination "on the basis of sex."

That is a doctrine which has often been forcefully advocated in Congress and in the courts by the Women's Legal Defense Fund, the American Civil Liberties Union, the National Organization for Women Legal Defense Fund, and other organizations which support this bill. They won a great victory on the day that federal bureaucrats incorporated that legal doctrine into Title IX.

Thus, these groups have established in Title IX a legal beachhead--an enclave in federal law in which failure to provide abortions is deemed to be illegal sex discrimination. They don't want to give that up. On the contrary, they see in the Civil Rights Restoration Act a vehicle to expand the reach and impact of that legal doctrine a hundredfold.

The day after the "Restoration Act" passed without the Tauke/Sensenbrenner Amendment, pro-abortion attorneys would be waiting outside the courthouses for the doors to open so they could file their lawsuits. They would use Title IX as a legal hammer against these pro-life hospitals if the bill passes. They have done precisely that with the Equal Rights Amendments which some states have added to their state constitutions. When legislatures consider ERAs, feminist lobbies insist that ERAs do not change abortion law. But once the ERA is adopted, the ACLU and similar groups aggressively employ the ERAs to challenge pro-life policies.

For example, last year the ACLU persuaded the Connecticut courts that the refusal of the state government to pay for elective abortions under its Medicaid program was sex discrimination and violated the state ERA.

WHO'S KIDDING WHO?

The president of the National Organization for Women recently charged that we are seeking to interject the abortion issue into congressional debate on all bills dealing with sex discrimination.

Who's kidding who? We all know that the pro-abortion feminist legal advocacy groups believe that restricting women's access to abortion is a form of sex discrimination. We all know that the feminist legal defense funds would be in court in a minute to defend the Title IX abortion regulations if the Administrative tried to repeal them without congressional action, and we all know that they would probably win.

We all know that the feminist lobbies scuttled the Civil Rights Restoration Act in the House during the 99th Congress, rather than permit it to pass with the Tauke/Sensenbrenner Amendment attached.

It made sense for them to kill the bill, from their perspective--

because they've got a lot at stake here. The Civil Rights Restoration Act would transform Title IX into a powerful legal weapon to further their goal of forcing all important institutions within this society to embrace abortion. The "Restoration Act" would give them a legal battering ram to break down the pro-life policies of many hundreds, if not thousands, of hospitals in this country.

And that's what this fight is really about.

LEGAL EFFECTS ON HOSPITALS

Under the Supreme Court's 1984 ruling in Grove City v. Bell, the pro-abortion requirements of Title IX apply to student and faculty health plans which receive federal aid--and that is bad enough. But the "Restoration Act" would vastly expand the application of the mandatory abortion regulations. Under the bill, if a single student at a university received a federal student loan, then that university would be required to provide abortion on demand in its student and faculty health plans.

Worst of all, thousands of off-campus hospitals would be covered for the first time by the pro-abortion requirements, as I will discuss in a moment.

There are many hundreds, perhaps thousands of hospitals in this country which do not perform abortions, or which perform them only under extreme circumstances. These pro-life policies may be based on pro-life community sentiment, opposition to abortion by staff nurses or other members of the staff, or for other reasons.

Many (but by no means all) the pro-life hospitals are identified with religious traditions which oppose abortion. Very few, however, are legally "controlled by" church officials. And only institutions which are "controlled by a religious organization" are legally entitled to claim the protection of the religious tenets exemption in Title IX [Section 901 (3)].

That point must be underscored: most "religious" colleges and hospitals are nowadays legally "controlled by" lay boards, not church officials. Rep. Patricia Schroeder (D-Co.) said last year that even Notre Dame and Georgetown are not entitled to religious tenets exemptions from Title IX, because they are "secular."

It is true that the Reagan Administration has apparently not applied a strict "controlled by" standard in reviewing applications for religious tenets exemptions--but it also true that the current permissive application of the "controlled by" standard may not survive a court test or a change in administration. Already, some religiously affiliated colleges have been harassed with Title IX complaints and frightened into providing abortion insurance.

A simple remedy is available--what has become known as the Tauke/Sensenbrenner Amendment. This amendment would make Title IX inapplicable to abortion. The amendment reads:

> "Nothing in this Title [Title IX] shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion."

Under this amendment, each federally funded college, and each off-campus hospital with a teaching program, would be free to establish a pro-life policy or a pro-abortion policy, as it sees fit.

HOSPITAL SERVICES TO THE PUBLIC

Let's talk about those hospitals for a moment. Before the Supreme Court's Grove City College v. Bell ruling, Title IX and the Title IX abortion regulations were believed to apply to the student and faculty health plans at any university which received federal funds.

Pre-Grove City, off-campus hospitals, with no relationship to the university except a medical teaching program, were not covered by Title IX or by the Title IX abortion regulations. We've found no record that anybody even suggested that such teaching hospitals were covered pre-1984. Maybe in somebody's mind they ought to have been covered, but in the real world out there, these non-campus hospitals were not covered.

But the proponents of the "Restoration Act" concede that, under the bill, any hospital with a teaching program would be covered by Title IX and by the Title IX abortion regulations.

For example, the Leadership Conference on Civil Rights has circulated a memorandum which states:

> "Hospitals which do receive federal assistance to operate education programs or activities are covered by Title IX but only with respect to their education programs or activities." (Memorandum on the Tauke/Sensenbrenner Amendment, June, 1985.)

So, the proponents of the bill concede that under the bill, any hospital with interns, residents, or nursing students will be regarded as an arm of (or "operation" of) the federally funded university medical school, and therefore will be reached by Title IX.

Again, these non-campus hospitals were not covered pre-Grove City. It looks like this is not just "a simple restoration act," after all.

SERVICES TO THE PUBLIC

Now, while conceding that that the Restoration Act extends Title IX to cover all teaching hospitals, the Leadership Conference on Civil Rights would have us believe that Title IX will be applied within the hospital in a very fastidious, program-specific manner. Under the Restoration Act, they assure us, the hospital will be required to fund abortions only within its "educational component." That is, they claim that the hospital will be obligated to provide abortions only for the medical students, nursing students, and teaching staff.

Even if that were the full extent of the mandatory abortion policy, it would fully justify all-out pro-life opposition to the bill in its current form.

But in fact, the argument that the mandatory abortion requirements will somehow be confined to the "educational activities" of the hospital, does not pass the "straight face test." Such a "program-specific" interpretation would run counter to the entire thrust of the Restoration Act! The whole idea is to abolish the program-specific approach and extend federal non-discrimination guarantees to "all of the operations of" federally funded entities.

How could the reach of Title IX possibly be confined to the "educational" personnel within a hospital? The teaching programs permeate the entire institutions. The interns, residents, nursing students, and teaching staff are directly involved in providing health services to the public.

Indeed, interns often receive much of their training in the hospital clinics which provide medical services to indigent persons. What if such a clinic--which is certainly an "educational activity" of the hospital--decided to provide services only to indigent men? Of course, that would be discrimination "on the basis of sex" and would violate Title IX. But as Title IX has been interpreted, it is also "sex discrimination" for that clinic to refuse to provide abortions!

Consider how untenable a hospital's position would be, under this bill, if they provided abortion insurance for their staff but continued to deny abortions to the general public.

Some feminist legal defense fund would tell the federal district court: "Look, the hospital acknowledges that they would be in violation of Title IX if they did not provide abortions within their teaching program. But the hospital administration claims that it does not violate Title IX to deny abortions to the indigent population which they serve--the very people for whom unintended pregnancies are most burdensome! This is invidious discrimination based on sex which clearly violates the letter and spirit of Title IX, as long embodied in Title IX regulations, as recently implicitly ratified when Congress passed the Restoration Act." And the hospital would very likely lose.

We have consulted leading legal specialists in abortion law and sex discrimination law. They tell us that the effect of the "Restoration Act" will be to require all teaching hospitals to provide abortion on demand to the general public.

For example, Professor Robert A. Destro of The Catholic University of America School of Law, a member of the U.S. Commission on Civil Rights, has stated that the bill would expose hospitals to lawsuits demanding that they provide abortions to the general public, and that these lawsuits would be "quite likely succeed because, once accepted as an essential component of sex discrimination law, the 'right to abortion' will override even sincerely held religious objections to providing abortion."

NRLC's own general counsel, James Bopp, Jr., a nationally recognized authority on abortion law, states in a March 4 memorandum:

> "Since S. 557 has incorporated into Title IX the principle that discrimination on the basis of sex includes failure to provide abortion-related services, the teaching hospital would be required to provide them to the general public."

The attorneys of the Americans United for Life Legal Defense Fund, in a memorandum on S. 557 dated March 2, 1987, wrote:

> "From requiring hospitals to provide abortion coverage to interns, residents, nursing students and teaching staff, it would be a small step to require the hospital to provide abortion services to patients in general. Current title IX regulations define the refusal to fund abortions in federal programs as 'sex discrimination'...[A] federal court may view favorably a lawsuit alleging that the refusal of the hospital (which also receives significant federal funding) to provide abortions to patients is also 'sex discrimination.'"

PENALIZATION OF WOMEN: A RED HERRING

Pro-abortion advocacy groups have claimed that the Tauke/Sensenbrenner Amendment would permit federally funded universities to penalize women who obtain abortions on their own. Although this objection was obviously contrived, some House sponsors of the "Restoration Act" went through the effort of crafting a cumbersome alternative amendment that removed all pro-abortion requirements from Title IX, while explicitly stating that a woman could not be penalized for obtaining an abortion with her own funds. All such formulations were angrily rejected by the National Organization for Women and similar groups, thereby demonstrating that their real priority is indeed to preserve the compulsory abortion policy which has been grafted onto Title IX.

CONCLUSION

Mr. Chairman, when I was in my teens, this committee and the Congress approved "civil rights" legislation which was worthy of the name--legislation intended to insure that all Americans would be regarded with equal dignity under our system of laws, such as Title VI of the Civil Rights Act of 1964.

I hope the day will come when some of those groups which support the "Restoration Act" for reasons unrelated to abortion will tell the militant pro-abortion groups to carry their own water. It grieves and angers me to see organizations such as the National Organization for Women seeking to covertly advance a pro-abortion agenda by piggybacking on civil rights legislation. In so doing, they debase the term "civil rights."

We're all for "civil rights" properly so called, Mr. Chairman. But there are many of us who don't think that opposing abortion is a form of sex discrimination. We're going to fight this bill and any other bill which expands Title IX coverage, until Title IX is rendered neutral on abortion.

I thank the committee for this opportunity.

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QUESTIONS FOR MS. JAMES

1) As you know Title IX regulations require that federally funded educational programs treat abortion on the same basis as any other temporary disability "with respect to any medical or hospital benefit, service, plan or policy" for students, and like other temporary disabilities "for all job-related purposes" for employees. (34 C.F.R. 106.39, 106.40, 106.57)

Do you find it an anomaly that Congress has prohibited the use of federal funds for abortions under the Hyde amendment and yet under Title IX, colleges that receive federal assistance can be required to cover abortion services within their school health plan?

2) As you note in your statement, the Grove City College v. Bell decision clarified that Title IX regulations which mandate abortion services apply only if the specific university program receives federal financial assistance-- in this case, the school health clinic or health program?

-- How would S. 557 affect this question of mandating colleges to cover abortion services?

3) Is it your view that under S. 557 any hospital not owned or controlled by the University, would be under obligation through these regulations to provide abortion services merely because medical students connected with that university are doing a rotation there?

4) Under S. 557 would a university hospital be required to offer abortion services to the general public, as well as students and faculty connected with the university?

5) On a point of clarification, you are not asking that all teaching hospitals be prohibited from performing abortions. Instead, you are stating that S. 557 would require that all teaching hospitals and college health plans cover abortions and you believe these entities should be able to choose whether or not to cover such services, it that correct?

6) You assert that this bill fails to restore the law as to Title IX to the status prior to the Grove City case, but instead expands the coverage under Title IX as to abortion. Can you explain this more fully citing relevant provisions of S. 557?

7) In so far as this expansion might conflict with State or local law relating to abortion, would S. 557 preempt such State or local law in your view?

8) You suggest in your written testimony that certain women's groups would argue that restricting women's access to abortion is a form of sex discrimination and would press for expansion of abortion coverage under under Title IX if S. 557 were enacted. Do you have any evidence indicating that this interpretation of sex discrimination would be pursued under Title IX?

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April 24, 1987

Senator Edward Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Attn: James W. Powell

Dear Senator Kennedy:

In response to your letter of April 10, I am submitting herein my responses to certain written questions from Senator Hatch. Mr. James Powell was kind enough to permit me an extension of several days to complete these responses.

I understand that my responses will appear in the hearing record on S. 557, the "Civil Rights Restoration Act."

Please note that I am submitting for inclusion in the hearing record two documents which are referred to in my responses: a letter from the Catholic Health Association, and a transcript of an interview which sheds light on the impact of S. 557 on religiously affiliated institutions.

Thank you.

Sincerely,

Kay C. James

Kay Coles James
Director of Public Affairs

enclosures

Responses of Kay Coles James, Director of Public Affairs,
National Right to Life Committee,
to written questions submitted by Senator Orrin Hatch

April 24, 1987

1. Do you find it an anomaly that Congress has prohibited the use of federal funds for abortions under the Hyde amendment and yet under Title IX, colleges that receive federal assistance can be required to cover abortion services within their school health plans?

Response: Yes, it is an anomaly that under Title IX, as Title IX has been interpreted, it is a form of "sex discrimination" to fail to pay for abortion. And if S. 557 passes without a suitable amendment, that legal doctrine will be expanded so as to override many pro-life policies adopted by state and local governments and private institutions.

For 11 years, Congress has enacted the "Hyde Amendment" barring funding of abortions under the Medicaid program. Moreover, Congress has enacted many other provisions of law which make it clear that abortion is not to be regarded as simply another "medical procedure," but rather, is an act which the federal government does not wish to in any way encourage or subsidize. For example, Congress has specifically prohibited payments for abortion under the Federal Employees Health Benefits (FEHB) program.

Obviously, it would be a glaring inconsistency for Congress to pass S. 557, unless it is revised, because the unamended bill which would force thousands of colleges and hospitals to pay for abortions with their own funds, and to use their facilities for abortion.

This result can only be avoided by adoption of what we call the "abortion-neutralization" amendment to S. 557, which would establish that Title IX does not require institutions to provide abortions. This amendment, referred to as the "Tauke/Sensenbrenner Amendment" after its House sponsors, will be offered on the Senate floor by Senator John Danforth.

2. As you note in your statement, the Grove City College v. Bell decision clarified that Title IX regulations which mandate abortion services apply only if the specific university program receives federal financial assistance--in this case, the school health clinic or health program. How would S. 557 affect this question of mandating colleges to cover abortion services?

Response: Under Grove City College v. Bell, the Title IX regulations requiring coverage of abortion on demand are enforceable only if the student or faculty health plan receives federal assistance. It appears that most such plans do not receive federal assistance. Thus, the impact of the pro-abortion regulations is at the moment significantly limited by the current program-specific application of Title IX.

That does not mean, however, that the pro-abortion regulations currently cause no problems. Even under the Grove City decision, Title IX is being used to harass and intimidate religiously affiliated colleges into providing abortions in their health plans.

According to a statement by Secretary of Education William Bennett, dated March 31, 1987, during FY 1985-86, a single individual filed 688 complaints alleging violations of Title IX; these complaints alleged violations of the Title IX regulations governing pregnancy and abortion.

Hundreds of these boilerplate complaints were filed against religiously affiliated colleges, many of which do not provide abortions for religious reasons.

Every one of these complaints automatically triggers a complex investigatory process, which some college administrators (and their attorneys) apparently find intimidating. We have correspondence which suggests that the mere filing of these boilerplate complaints and the ensuing investigatory process have panicked some religiously affiliated colleges into beginning to pay for abortions, notwithstanding their religiously based objections to abortion, and notwithstanding the fact that these student health plans are not receiving direct federal funds.

Obviously, if S. 557 is enacted without amendment, then any non-religious educational institution which receives any direct or indirect federal assistance (or which admits a student who receives federal assistance) would be required to pay for abortion on demand. Even worse, almost all religiously affiliated colleges will also be required to provide abortions. Only the relatively small number of colleges which are directly legally "controlled by" church officials will be exempt.

I am puzzled as to why some senators and organs of the press have expressed skepticism that anyone would want to force religiously affiliated colleges and hospitals to provide abortions. Such skepticism is obviously unwarranted, since religiously affiliated colleges are being harassed even under the current law, as discussed above. The situation would be far worse under S. 557.

Opponents of the Danforth Amendment to S. 557 claim that institutions which have religious-based objections to abortion can invoke the "religious tenets exemption" in Title IX. But when these claims are examined more closely, it becomes clear that these pro-abortion groups believe that only the relatively small number of institutions which are directly "controlled by" church officials should be able to claim the "religious tenets exemption."

Indeed, the recent public statements of some opponents of the Danforth Amendment strongly suggest that they can hardly wait for the day when Title IX--including its current pro-abortion component--can be used as a legal weapon against hundreds of Roman Catholic colleges and other religiously affiliated (but not religiously "controlled") colleges that do not currently provide abortion.

Anyone who doubts this should review the document titled "Civil Rights Held Hostage," recently published by the pro-abortion lobbying organization which calls itself "Catholics for a Free Choice." The major thrust of the document is that the nation's Roman Catholic colleges should not be exempt from any of the requirements of Title IX, since they are only "loosely affiliated" with the Church hierarchy. According to this pro-abortion group, in enacting the "religious tenets" exemption of Title IX, Congress intended only to shelter male-only seminaries from Title IX! This document refers to the pro-abortion Title IX regulations with approval, and implicitly argues that these regulations should be enforced against most of the nation's 235 Roman Catholic-affiliated colleges.

To cite another example: in a recent broadcast debate on S. 557, Mark Bartner, legislative coordinator for the Religious Coalition for Abortion Rights (RCAR), stated that Title IX should require Notre Dame University to pay for abortions. Notre Dame does not qualify for a religious tenets exemption to Title IX if "Notre Dame wishes to be construed as a nonsectarian institution, and open its faculty and its student body to non-Catholic students, which it has done," Mr. Bartner said. He added that Notre Dame should be required to pay for abortions in order to "reflect the religious diversity of its student body and faculty."

[I am attaching a transcript of part of that illuminating debate as an addendum to these written responses, for inclusion in the hearing record.]

3-4. Is it your view that under S. 557 any hospital not owned or controlled by the university, would be under obligation through these regulations to provide abortion services merely because medical students connected with that university are doing a rotation there? Under S. 557, would a university hospital be required to offer abortion services to the general public, as well as students and faculty connected with the university?

Response: We're talking here not about on-campus university hospitals, but off-campus public, private, and religiously affiliated hospitals which have no connection to the university except a teaching program-- residents, interns, or nursing students.

Now, the Leadership Conference on Civil Rights and other advocates of S. 557 acknowledge that S. 557 would expand Title IX to cover these off-campus hospitals--which are not currently covered.

These groups claim, however, that "only" the "educational activities" of these off-campus hospitals would be covered by Title IX. That means, for example, according to Mark Bartner, legislative coordinator of the Religious Coalition for Abortion Rights, that Roman Catholic hospitals which have teaching programs would be forced to include coverage of abortions in the health plans they provide for their teaching staff, interns, residents, and nursing students.

The Danforth Amendment would be absolutely essential even if that was the only pro-abortion effect of S. 557.

But in fact, if the hospital is guilty of "sex discrimination" under Title IX if it fails to pay for abortions for its students and staff, then it clearly follows that the hospital is guilty of "sex discrimination" under Title IX if it fails to provide abortions to the public.

RESPONSE OF KAY COLES JAMES, NATIONAL RIGHT TO LIFE, TO SEN. HATCH, PAGE 4

When proponents of S. 557 say that the abortion regulations will apply "only" to the educational activities of the hospital, they are being disingenuous. In a teaching hospital, the "educational activities" permeate the entire institution. The interns, residents, and nursing students are not off in a classroom somewhere. Their "educational activities" consist mainly of providing medical services to the public (often, to indigents).

Moreover, the claim that Title IX would be "limited" to the "educational activities" of a hospital (however defined) is contradicted by the plain language of S. 557. Section 3 of S. 557, which amends Title IX, contains precisely the same sweeping language as the sections of the bill which amend Title VI, Section 504, and the Age Discrimination Act. That language extends coverage of Title IX to "all of the operations of" a federally funded educational institution. It does not say "all of the educational operations."

(Furthermore, coverage is extended to "an entire corporation...or other private organization...which is principally engaged in the business of providing...health care...")

This creates an entirely new legal situation. As Secretary of Education William Bennett stated in a March 31, 1987 letter to Senator Kennedy:

> "Prior to the Grove City case...the Department of Education never claimed jurisdiction based on education funding over activities unrelated to education, such as...over patient care in a hospital run by a postsecondary institution... S. 557 would extend the reach of the four statutes to cover private sector activities in a much broader fashion than ever before."

As the general counsel of the U.S. Catholic Conference, Wilfred Caron, wrote in a widely disseminated analysis of the "Civil Rights Restoration Act" (Feb. 26, 1985):

> "[Under the bill] Title IX's proscriptions against sex discrimination would no longer be limited to educational programs as is the case under the present statute. They would include all of the activities, both educational and noneducational, of an organization that operates an education program among its various activities."

That is why the Catholic Health Association, which represents over 900 Roman Catholic health facilities, has taken a position of opposition to S. 557 unless the Danforth Amendment is adopted. In an April 21 letter to Senator Kennedy, the Catholic Health Association said:

> "Without this [Danforth] amendment we would be forced to oppose S. 557 because it could require all Catholic hospitals which participate in teaching or other educational programs, e.g., interns, residents, nursing students, to provide abortion services. Federal law and regulations should never put Catholic health care facilities in a position of having to provide abortions or abortion insurance coverage."

[I am submitting the entire letter as an addendum to my response.]

In summary, under the bill, Title IX would apply to "all of the operations of" an off-campus teaching hospital, not only to the "educational activities" of the hospital. Moreover, even if Title IX extended "only" to the hospital's "educational activities," the legal effect would be to require the hospital to provide abortions to the public, as explained above.

5. On a point of clarification: you are not asking that all teaching hospitals be prohibited from performing abortions. Instead, you are stating that S. 557 would require that all teaching hospitals and college health plans cover abortions, and you believe these entities should be able to choose whether or not to cover such services. Is that correct?

Response: I'm glad to clarify that, since there has been inexplicable confusion on this point in some press accounts. We have not advocated amending S. 557 to prohibit federally funded colleges or hospitals from providing abortions if they so choose. Again, we support the Danforth Amendment to S. 557 (known in the House as the Tauke/Sensenbrenner Amendment) would permit federally funded colleges and hospitals to provide or not provide abortions, as they see fit.

Of course, the National Right to Life Committee advocates reversal of the Supreme Court's Roe v. Wade decision and advocates legislation to directly protect unborn human beings fro the violence of abortion. However, we are not seeking to use the "Civil Rights Restoration Act" as a vehicle to enact an anti-abortion policy. We are merely insisting that S. 557 be amended so that Title IX does not compel institutions to provide abortions.

6. You assert that this bill fails to restore the law as to Title IX to the status prior to the Grove City case, but instead expands the coverage under Title IX as to abortion. Can you explain this more fully, citing relevant provisions of S. 557?

Response: S. 557 is labeled as a "restoration act," but that label does not limit the legal effects of the bill. With respect to Title IX, S. 557 would extend coverage far beyond anything which existed prior to 1984.

Prior to the Grove City decision, Title IX did not apply to "all of the operations of" an off-campus hospital which has a teaching program. It is indisputable that under the bill, such coverage would exist. So in legal effect, this is not a "simple restoration act."

Opponents of the Danforth Amendment have been unable to offer any plausible explanation of how a teaching hospital could legally defend a policy of not providing abortions to the public under S. 557. When pressed on this point, they evade the issue, responding that "since no hospital was forced to provide abortions prior to Grove City v. Bell, none would be forced to provide abortions under S. 557." That is a non sequitur. It begs the question.

If S. 557 is enacted without the Danforth Amendment, federally assisted colleges and hospitals (including religiously affiliated colleges and hospitals) will be vulnerable to lawsuits seeking to compel them to provide abortions. At that point, all of the current facile assurances that S. 557

is "just a simple restoration act" will be absolutely irrelevant to their legal situation. The only legally pertinent question will be: What requirements does Title IX impose on this institution? And the answer will be that Title IX will require that "all of the operations of" the institution must provide abortion on the same basis as "other medical procedures."

7. Insofar as this expansion might conflict with State or local law relating to abortion, would S. 557 preempt such State or local law in your view?

Response: Of course, under the Supremacy Clause of the U.S. Constitution, federal law (including regulatory law) overrides state or local law.

As an illustration, note the testimony provided to the Committee by the chief attorney for the City of St. Louis, James J. Wilson, who testified that S. 557 would extend Title IX coverage to the St. Louis Regional Medical Center. The St. Louis City Council and the St. Louis County Board have prohibited the Medical Center from providing abortions to the public, and state law prohibits inclusion of abortion coverage in group health plans in Missouri. Title IX would override such city, county, and state laws, compelling the hospital to provide abortions both for its employees and to the public.

There are many other non-religious, government-operated hospitals which do not provide abortions. These pro-life policies have been established by democratic processes, but they would all be overridden by Title IX if S. 557 is enacted without the Danforth Amendment.

8. You suggest in your written testimony that certain women's groups would argue that restricting women's access to abortion is a form of sex discrimination and would press for expansion of abortion coverage under Title IX if S. 557 were enacted. Do you have any evidence indicating that this interpretation of sex discrimination would be pursued under Title IX?

Response: My concern is not with "women's groups" in general, but rather with radical feminist organizations and with pro-abortion legal defense groups, such as the "Reproductive Freedom Project" of the American Civil Liberties Union.

Spokespersons for such organizations are currently saying that S. 557 creates "no new abortion rights" under Title IX. But in so saying, they concede nothing, because Title IX has already been interpreted to equate abortion rights and sex discrimination.

These organizations believe that any policy which treats abortion different from other "medical services" is a form of "sex discrimination," as they have argued in many lawsuits and elsewhere. And in Title IX they have a law in which that legal doctrine is already incorporated, by administrative interpretation.

S. 557 would provide these groups with a new and powerful legal weapon, by extending Title IX to thousands of institutions not currently covered by

Title IX. They are especially eager to use Title IX against the many pro-life colleges and hospitals which are religious affiliated, but which are not legally "controlled by" church officials, as discussed in my answer to question #2.

Does anyone really believe that they will fail to employ this legal weapon? If S. 557 is enacted without the Danforth Amendment, it is absolutely predictable that feminist and pro-abortion legal defense funds will use Title IX to challenge the pro-life policies of secular and religiously affiliated hospitals from coast to coast.

I hope no one is so naive as to think that the current disclaimers by spokespersons for feminist groups will in any way inhibit their legal attacks if this bill becomes law. Look at what has been done with the Equal Rights Amendments which have been adopted in certain states.

An Equal Rights Amendment prohibits discrimination "on the basis of sex," just like Title IX. For years, pro-life groups were ridiculed by feminist activists for suggesting that ERAs could have pro-abortion legal effects. Feminist groups assured pro-life state legislators that ERAs do not create abortion rights. "The ERA does not even mention abortion," as we were informed in countless news stories and editorials.

Once an ERA becomes law, however, the tune changes. Already, attorneys with the American Civil Liberties Union have used ERAs in lawsuits in four states, seeking state funding of abortion on demand. In the most recent such case, in Connecticut, the ACLU won a complete victory. The state courts ruled that the Connecticut ERA requires the state to pay for elective abortions; failure to do so is "sex discrimination." Without embarrassment, those earlier assured us that the ERA had nothing to do with abortion, applaud this "progressive" interpretation of the ERA. After all, they say, what could be a more glaring example of "sex discrimination" than to deny a woman an abortion?

And that's exactly what will happen if the "Civil Rights Restoration Act" becomes law--unless the Danforth Amendment is adopted.

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April 21, 1987

The Honorable Edward Kennedy
Chairman
Senate Labor and Human
  Resources Committee
113 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

The Catholic Health Association, on behalf of the Catholic health facilities of this country which are our members, wishes to comment on the Civil Rights Restoration Act of 1987 (Senate Bill 557), now being considered by your Committee. The Catholic Health Association, representing more than 622 Catholic sponsored hospitals, 279 health care facilities, 52 Catholic multi-institutional health care systems, as well as 278 congregations of women and men religious involved in health care delivery, joins the United States Catholic Conference in supporting the goal of alleviating discriminatory practices in our society.

The religious sponsors of Catholic health care institutions have traditionally been in the forefront of efforts to eliminate discriminatory practices in the United States. Accordingly, Catholic health facilities have had a long record of offering care to those in need in a non-discriminatory manner.

Based on that long tradition, we would like to support S. 557. However, we are concerned about several aspects of the bill's current language and believe that improvements are needed for the legislation to fully protect the rights of all persons and to insure religious freedom as well.

Catholic health care facilities and personnel object to abortion and similar procedures as a matter of conscience and religious belief. Based upon regulations promulgated under existing law, however, we are apprehensive that the refusal of Catholic health care facilities to provide abortions or abortion insurance coverage could be interpreted under certain conditions as a violation of Title IX if S. 557 is passed in its present form. We do not believe that this should be the intent of the Congress in passing laws to protect citizens against discriminatory practices. In fact, we believe that the contrary should be clearly expressed in the text of the pending legislation so that it is not misinterpreted.

Representing over 900 hospitals and long-term care facilities nationwide.

NATIONAL OFFICE: 4455 WOODSON ROAD • ST LOUIS MO 63134-0889 • 314-427-2500

An amendment offered by Congressmen Tauke and Sensenbrenner in the last Congress would do a great deal to clarify this matter. The amendment states: "Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion." We recommend its approval by your Committee.

Without this amendment we would be forced to oppose S. 557 because it could require all Catholic hospitals which participate in teaching or other educational programs, e.g., interns, residents, nursing students, to provide abortion services. Federal law and regulations should never put Catholic health care facilities in a position of having to provide abortions or abortion insurance coverage.

Senate Bill 557 presently contains a provision which provides a limited exemption from enforcement of Title IX for "any operation of an entity except which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization." The Catholic Health Association has reservations about overly restrictive interpretations of the term "controlled by", and urges the Committee to expand the "religious tenet" protection as it would apply to different ownership and management approaches.

We thank you for the opportunity to present our point of view on these important matters which your Committee must consider in the preparation of Senate Bill 557.

Sincerely yours,

William J. Cox
Vice President
Division of Government Services

cc: Members of the Senate Labor and Human Resources Committee

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April 7, 1987

The Honorable Edward M. Kennedy, Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

Though our request to testify at the hearings on the Grove City legislation was not granted, we wish to submit these views for the record on S.557. The National Association of Evangelicals is an association of more than 46,000 churches from 72 Protestant denominations. Included in our evangelical constituency are nearly 300 Bible colleges, Christian liberal arts colleges, seminaries and graduate schools.

The "Civil Rights Restoration Act" (S.557) changes the pre-Grove City law in significant and harmful ways. It introduces a cumbersome and unpredictable federal administrative process into the field of public health and disease control which hitherto has been better and more safely served by local public and private medicine. While it "restores" a prior regulatory and administrative system, it does so without examination of numerous flawed patterns and unjust practices. It permanently imposes on many religious and other private institutions constraints against morality and conscience from which they have been seeking relief. The "religious tenets" exemption of the bill does not provide adequate relief. Thus S.557 would adversely affect the most fundamental of civil rights--religious freedom.

We would like to emphasize three major concerns:

I. Religious beliefs and moral convictions.

Among other private institutions which would be adversely and unjustly burdened by S.557 are more than 100 Bible colleges. Most of them do not seek or accept federal funds, but do accept students who have received federal assistance. Like Grove City College, these colleges do not discriminate against women as the term is ordinarily understood or as Congress meant the term in 1972. However, Title IX regulations require elective abortion insurance coverage, and pin the "discrimination" label on the omission of such coverage. Bible colleges ordinarily disassociate themselves from abortion sponsorship, which to them is morally unacceptable.

These regulations are indeed an historical travesty, since abortion was a crime throughout the States at the time Congress enacted Title IX. Congress could not have intended to make it subject to federal compulsion even if they could have foreseen that the Supreme Court would later constrain prosecution of abortion as a crime.

We do not believe that relief from abortion requirements on grounds of conscience should be limited to those institutions which are certifiably religious. Indeed, other federal law in comparable circumstances allows exceptions on the grounds of "religious beliefs or moral convictions." (42 U.S.C. §300 a-7. Other federal law prohibits the use of federal funds for elective abortions.)

Nevertheless, Bible colleges should be able to obtain religious exemptions from Title IX restrictions on practices such as refusal to sponsor abortion. Similar exemptions should be accorded a number of other faith-related practices which, while not constituting discrimination in any ordinary sense, are nevertheless proscribed in the regulations. Yet the literal language of the religious exemption provision has been interpreted by many in the Title IX field as requiring that even though the colleges themselves are religious organizations, they must be "controlled" by an outside religious organization in order to obtain a religious exemption.

Many Bible colleges are operated by independent religious corporations, and are not controlled by outside organizations. Such an interpretation requiring outside control is nonsensical. If churches and other religious organizations can confer exemption on their educational subsidiaries, then organizations such as Bible Colleges, whose own religious nature has never been questioned, should certainly be entitled to such an exemption.

Moreover, putting Bible colleges and their students in a position of having to choose between a generally available public benefit such as student assistance, and a violation of religious conscience, invites constitutional attack. A line of cases has prohibited the burdening of religion with unconstitutional conditions. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); and Hobbie v. Unemployment Appeals Commission of Florida, slip op. 85-993 (Feb. 25, 1987).

II. Bad regulations and administration made permanent.

By its radically broad new provisions S.557 would clearly extend federal jurisdiction beyond the law in effect before Grove City. For example, it would apply not only "institution-wide", but beyond that to "education systems" and "combinations." Yet it is too ambiguous to make clear just where this expanding federal jurisdiction is intended to stop.

The ambiguity and uncertainty of coverage is exacerbated by the "finding" that the "prior. . . executive branch interpretation" is to be restored "as previously administered." This seems an attempt to lock in a set of massive and pervasive regulations which have been highly controversial and widely disputed, to the point that legislative modification has already been necessary to correct a few of the worst applications. Congressional action was necessary to permit even such innocuous activities as father-son dinners and Girl Scout activities and YMCA functions, which overzealous officials foolishly prohibited. An administration of the law which can ride rough-shod over such American traditions is not worthy of being ratified.

It is bad legislative practice to shut down entirely the normal agency function of adapting regulations to changing situations. It would be worse in this case where not only flawed regulations, but also the law "as previously administered" would be locked in by S.557. This might extend to individual rulings, to interpretive correspondence, even to particular enforcement actions whose rationale may never have been documented.

An example of one particular practice which cries out for change, before S.557 applies it to thousands of new institutions, was revealed publicly on March 31, 1987 in a statement by Secretary of Education William J. Bennett. He said that in 1985 and 1986, no less than 688 complaints under Title IX were filed by a single individual. Although this individual clearly was not personally affected at 688 institutions, the third party "fishing-expedition" complaint resulted in a full-fledged investigation of each college. This process is an unconscionable waste of public and private resources. Yet it would be mandated with the passage of S.557 unless amended.

III. Freedom from public health measures as a "civil right."

The Rehabilitation Act of 1973, Section 504, was broadly interpreted by the Supreme Court in School Board of Nassau County v. Arline (March 3, 1987). It is now impossible to "restore" the state of the law "before Grove City" because of the Courts expansive categorization of "handicapped" persons to include persons with contagious diseases, unless there is an appropriate amendment to S.557.

Alcoholism and drug addiction, and even transvestitism (Blackwell v. U.S. Department of the Treasury, 639 F. Supp. 289) have already been classified as handicaps, for which the federal process may be invoked under Section 504. This also deserves careful review before the problems are extended to and within so many additional public and private institutions under S.557.

S.557 is a massive expansion of the application of four statutes. We urge the Senate to review and correct the problems of substance and procedure and to clarify the extent of the bill's application before it is adopted.

Respectfully yours,

Robert P. Dugan, Jr.

Robert P. Dugan, Jr.
Director

RPDJr:jdk

The CHAIRMAN. The Senator from Ohio is going to have to leave, so I will recognize for the purpose of questions the Senator from Ohio, and then I would be glad if they want to have another round over here for the questioning of Ms. James, and then we will try and move ahead with the whole panel.

So we will proceed in that fashion.

Senator METZENBAUM. I thank the Chair.

Ms. James, forget about this bill for a minute. As I understand it, you do not like the requirements of title IX today. Now, am I correct about that?

Ms. JAMES. That is correct, sir.

Senator METZENBAUM. You oppose the regulations that have been on the books since 1975. You opposed them before the *Grove City* decision, and you oppose them now; is that correct?

Ms. JAMES. That is correct, sir.

Senator METZENBAUM. Until the Civil Rights Restoration Act came along, did you ever come forward and propose legislation to modify these regulations?

Ms. JAMES. Unfortunately, sir, I must admit to you that the ramifications of these regulations somehow slipped by us. But we do not want to miss this opportunity to correct that situation.

Senator METZENBAUM. Has the administration——

Ms. JAMES. I would also add that it really goes beyond just the regulations. The bill greatly advances the proabortion agenda in our country.

Senator METZENBAUM. Well, but for 12 years the regulations have been there. This administration has been in office 6½ years. Has this administration or any other taken steps to modify those regulations?

Ms. JAMES. Not to my knowledge.

Senator METZENBAUM. And have you done anything about it?

Ms. JAMES. Well, we have done whatever we could in Congress and both Houses to protect the lives of unborn children. But we have not done anything specifically about these regulations. That is why this is so important.

Senator METZENBAUM. You have many friends in the administration. Have you made any effort with those friends who support your position in the administration?

Ms. JAMES. I beg your pardon?

Senator METZENBAUM. Have you done anything with your friends in the administration——

Ms. JAMES. We have done a lot with our friends in the administration, and we are hopeful that they will, too, include looking at these regulations.

Senator METZENBAUM. And they have seen fit to take no action, even though——

Ms. JAMES. At this particular time, no.

We must understand that if the administration did step forward at this particular time, and do something to "with the stroke of a pen" get rid of the regulations, that the possibility of success is just absolutely minimal. And the reason for that is, you have 12 years of regulation history. We understand that it would go immediately to a court challenge. We understand that in order to correct this situation, the best way to do it is by amending the civil rights bill with the Tauke-Sensenbrenner amendment.

Senator **Metzenbaum**. You have not done a thing for 12 years, and now with this bill having to do with civil rights, you see fit to come before us and ask us to change the regulation by an amendment to that legislation; do you think that is right?

Ms. **James**. Yes, I do——

Senator **Metzenbaum**. You know you will kill the bill.

Ms. **James**. No, I do not know that.

Senator **Metzenbaum**. Well, you will kill the bill.

Ms. **James**. I do not know that. I do not know that, Senator, and I do not think you do, either, because I think if you will look as far back as last year, in an article that I wrote in USA Today, I challenged the House to bring that bill to the floor, because we had enough votes to pass that bill with the Tauke-Sensenbrenner amendment.

So it is not the prolife movement that is tying up the civil rights bill.

Senator **Metzenbaum**. In that article you wrote in "USA Today you claimed that the Civil Rights Restoration Act is an attempt by women's groups to advance proabortion policies and that they are trying to inject abortion into this issue. But the fact is, you are the one insisting upon the abortion language, and everyone else is willing to put in a provision saying this bill has nothing to do with abortion or these regulations.

Didn't you simply decide to seize on this bill as another vehicle to try to advance your position on the abortion issue, when you have done nothing about the regulations in 12 years?

Ms. **James**. Absolutely not. I think, Senator, that when you understand the regulations that are currently there, when "sex discrimination" has come to mean in our nation that a women is entitled to an abortion—when we came to understand that those regulations meant that, those of us within the prolife community became concerned. We came to recognize that we had to remedy that situation, and the best way to remedy that situation is to make sure that within the context of the Civil Rights Restoration Act, no one would interpret sex discrimination to mean a woman's legal right to take the life of her unborn child.

Senator **Metzenbaum**. But the fact is that if this amendment will kill the Civil Rights Restoration Act, will you still insist upon the amendment?

Ms. **James**. Senator, this amendment will not kill the Civil Rights Restoration Act.

Senator **Metzenbaum**. I did not ask you that—I did not ask you for your commentary. I asked you for a "yes" or "no" answer.

Ms. **James**. You see, while I am absolutely concerned about civil rights issues, I am also concerned about the civil rights of pre-born human beings, Senator.

Senator **Metzenbaum**. If it appears definitely that this amendment will kill the bill, will you still insist upon your amendment, or will you go back to the administration and let them try to change the regulations?

Ms. James. Senator, I am not going to be put in a position by you of going on record as saying that I intend to kill the Civil Rights Restoration Act.

Senator Metzenbaum. I did not ask you that.

Ms. James. And that is not what the intent is.

To answer your question: to have this bill go through without the abortion-neutral amendment would be so devastating, as it relates to hundreds of thousands of unborn children's lives, perhaps millions, then no, I could not be satisfied with this bill to go through unamended.

Senator Metzenbaum. Then you would be willing to kill the bill.

Ms. James. I would not be——

Senator Metzenbaum. I would interpret that to indicate you would be willing to kill the bill.

Ms. James. I would not be willing to kill the bill, Senator. The bill can pass with the abortion-neutral amendment.

Senator Metzenbaum. In your USA Today column, you say that this bill is an attempt to advance proabortion policy. Last year, the administration supported a bill introduced by Senator Dole which would have extended the ban on discrimination to an entire educational institution if it received Federal funds. It had no provision modifying the current regulations. Did you criticize the administration at that time for attempting to advance proabortion policies?

Ms. James. No, Senator, we did not.

Senator Metzenbaum. And last Congress, the House Judiciary Committee adopted an amendment saying that this bill neither approved nor disapproved existing regulations.

Why isn't it sufficient to simply say that this bill has no effect one way or the other on these regulations?

Ms. James. Because, Senator, that particular language absolutely does nothing in terms of reaching far enough into title IX to make sure that it protects pro-life institutions. The language to which you refer was offered, but it really did not take care of the problems that we within the prolife movement have with the bill. The Tauke-Sensenbrenner language does do that.

Senator Metzenbaum. Ms. James, I think my time has expired, but I want to say this. Those of us concerned about civil rights in this country need this bill. We believe it is imperative. We believe for six and a half years, the clock has been turned backward with respect to civil rights.

We believe that in the last three years, it has been turned backward even further by reason of the *Grove City* decision.

Now, I am saying to you that I think it is a tremendous burden to accept on your shoulders the fact that with this amendment, this bill will not pass. And I say to you that you have other remedies, you have had those remedies. But no, you are more interested in tying on this abortion amendment to this bill, the Civil Rights Restoration Act, and I think you are doing a disservice to all of us, and I hope you share with me our concern about civil rights in this country.

Ms. James. Senator, you know that I share with you a concern for civil rights in this country. And I want to go on record again as saying that the National Right to Life Committee is opposed to this bill solely because of its pro-abortion ramifications. That can be remedied. And the very minute that that particular situation is remedied, National Right to Life will withdraw its opposition to the bill. It is a simple matter to make sure that we protect pro-life institutions. And that can be done.

Senator METZENBAUM. I think my time has expired.

Thank you, Mr. Chairman.

The CHAIRMAN. May I inquire of the desire of the Committee. Shall we go ahead with the panel or do——

Senator WEICKER. Mr. Chairman, I have no questions of this witness. As I indicated to you earlier, I do not intend to spend one minute of my time getting bogged down on the abortion issue. I think Senator Metzenbaum asked all the questions in that sense.

I am receiving an award from a disabled group here, which started at noon, and I have got to get to that. But again, I have no questions of this witness, and I yield back my time.

Senator HUMPHREY. Mr. Chairman, if I may, I will not ask a question, but if it is acceptable, I would just like to read in the space of 20 seconds the so-called Tauke-Sensenbrenner amendment to which Ms. James was referring. It is quite innocuous. I do not know why, in fact, even the chairman might not want to support it.

It says this:

> Nothing in this Title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any public or private entity or organization to provide any benefit or service relating to abortion.

It is really quote straight-forward and limited—of enormous importance, from our point of view, but nothing at all disingenuous or tricky about it. And I would hope that Members would consider supporting that amendment.

The CHAIRMAN. Does the Senator suggest that that is a substantive change to title IX or a nonsubstantive change?

Senator HUMPHREY. Will the Senator define the difference?

The CHAIRMAN. Well, of course. I mean are you trying to change the law, or are you not trying to change it? If it is a substantive change, as we have indicated, it ought to come on some other kind of a vehicle; if it is not, if the question is one of clarification, then——

Senator HUMPHREY. Well, the difficulty is that by expanding title IX coverage, you expand abortion coverage, and that is the fact of life.

The CHAIRMAN. We will go ahead with our panel.

Mr. Wilson?

Mr. WILSON. Mr. Chairman, members of the committee, I would like to make a correction. I am listed here as a member of the city council, which I presume would connote a legislator. I am in fact the city attorney for St. Louis and a member of the executive branch.

The CHAIRMAN. Fine. The record will so indicate.

Mr. WILSON. I have presented written testimony to the committee. I would like to, rather than read that testimony, summarize it very briefly.

I think in reviewing Senate bill 557, the city of St. Louis has a problem, and I think that we are probably not alone. And if I might, I would like to go into that problem.

The city of St. Louis, following the *Roe* and *Doe* decisions, landmark decisions, in 1973, adopted as a policy of the city the fact that our city hospitals which were operating at the time would not perform elective abortions. There would therefore be no public funding in the city of St. Louis.

This was immediately challenged in court as being a denial of equal protection of the law under the Federal Constitution. That particular lawsuit went through the courts; it got up to the United States Supreme Court, and it is found in the books now as the decision of *John H. Poelker* v. *Jane Doe,* 432 U.S. 519, 53 LEd 2, 528, Poelker being the mayor of the city of St. Louis at the time. That decision holds—and I think rather firmly holds—that there is no Constitutional right to public funding of elective abortions.

Since 1973 and prior, the city of St. Louis has adhered to that policy in respect to the operation of its city hospitals.

In June of 1985, the city of St. Louis got out of the hospital business, so to speak. We closed our last remaining acute care hospital. We did, though, simultaneously because of our obligation to indigent residents to provide hospital care, enter into a contract with a Regional Health Care Corporation. Regional Health Care Corporation was formed as a not-for-profit corporation by local business and civic leaders to allow both the city of St. Louis and its adjoining county to discharge its obligation to indigent residents without having the necessity of the city and the county continuing to operate its own hospitals. The terms of the city's relationship are particularly set out by the city ordinance.

The contract that was entered into between Regional and the city provided that no elective abortions would be performed at Regional Hospital. This was an extension of the policy that I previously indicated had been existent and continued after the landmark *Roe* and *Doe* decisions in 1973.

The ordinance and contract provides that the level of care in respect to indigents would be policed by a board of overseers. The contract also provides that the city of St. Louis would pay and subsidize for the health hospital care provided at Regional Hospital for its residents.

The contract, though—and I have submitted it as an exhibit to my testimony—contains the specific prohibition against an abortion being performed.

Regional Hospital, in carrying out or discharging its obligations to the indigents of the city and the county of St. Louis, entered into a contract with Washington University Medical School for the university to provide the physician component, the staffing necessary for the hospital to operate effectively.

If I might digress, Washington University and its medical school have an excellent reputation in the Midwest. Its medical school is very well regarded.

The contract with the medical school provided that the university would supply a teaching function and in effect operate Regional Hospital as a teaching hospital, bringing with it its residents and interns and other students.

The agreement with the university specifically provides that the Washington University physicians would abide by the policies of Regional Hospital and would follow the ordinances and laws of the city of St. Louis. In respect to this discussion, the contract had been authorized by law, by ordinance of the city of St. Louis, its legislative body, that that ordinance contain the prohibition against elective abortion.

Here is what, as an attorney, I would see the effect of Senate bill 557 upon our operation of Regional Hospital. Because of the regulation, which I think has been discussed in our previous panel, which finds that termination of pregnancy is part and parcel of title IX, it would appear to me that a denial of an abortion at Regional Hospital would give rise to a cause of action, a lawsuit, by any of our indigent women who are denied such an abortion.

The Supreme Court decision of *Cannon* v. *University of Chicago* establishes a private claim that a woman would have who has been discriminated against.

It would be my belief that with the passage of Senate bill 557 without an abortion-neutral amendment, we would find ourselves in a dilemma as far as city government would be concerned. We would have the problem of either cancelling our contract with the medical school and going out and finding another physician component to staff our hospital—that is unrelated to education—or we would go back and, through a democratic process, determine whether or not we want to change our policy against funding of elective abortions.

Now, I am not here as a constitutional lawyer. I think there apparently are a number of differing interpretations of Senate bill 557. I have seen one interpretation that the reach of it is very limited. I have also seen interpretations that it can be broadly applied.

As an attorney, and I guess a cautious one, who is deeply involved in defending a number of different lawsuits that arise out of our civil rights acts, I would only have to move with an abundance of caution and advise my clients to avoid the hazards of litigation and either get rid of the university affiliation, which carries with it, I think, clearly the regulation which has been discussed previously concerning termination of pregnancy being a medical service that must be provided, or change the policy in respect to elective abortions.

Now, you might ask, well, why not cancel the university affiliation and go out and hire physicians to carry on your work. Our Regional Hospital is in substance a public-run hospital. We serve a high volume of indigent persons, many of whom have no private physicians. We operate clinics in addition to the hospital on a 24-hour basis. In order to provide the staffing for both the hospital and the clinics, we would have a cost factor that would go out-of-sight.

Right now, presently, the city of St. Louis is providing 10 percent of its total budget, or $28 million a year, to hospital care. We are stretched to the ultimate. To remove the University affiliation would be a financial burden that I think would adversely reverberate on the health and hospital care presently being afforded to our indigents. This, we do not want to do.

The other benefit of a medical school affiliation and becoming a teaching hospital is this is the only way you can remain absolutely current with medical practice. We find, in treating an indigent population, the indigent population brings with it many of the ills that the middle-class, affluent person who has received preventive health care throughout his life would not have. There are complexities in treating this type of population in our hospitals that necessitate having a teaching affiliation with a medical school and university that would keep us absolutely current.

The CHAIRMAN. We will give you another minute or so here, because we have other witnesses.

Mr. WILSON. This is the problem that I see from Senate bill 557, that Regional Hospital, because of its contract with the university, would be an institution which could not discriminate or, if it did discriminate, would face the threat of lawsuits being filed by each woman who had been denied an elective abortion. This because of Senate bill 557 is an entirely different exposure from which we had been subjected to before when we did operate city hospitals prior to 1985, under the existing several civil rights acts.

For this reason, I would strongly suggest—and I am sure the City of St. Louis is not alone in this—that we could have some amendment that would eliminate the abortion problem and allow us to continue the policy that has been in effect of not providing public funding of abortion, because this has been the will of the citizens of our city.

Thank you.

[The prepared statement of Mr. Wilson and responses to questions submitted by Senator Hatch follow:]

Testimony of

James J. Wilson

City Counselor

City of St. Louis, Missouri

on

Abortion-Related Aspects of the Civil Rights Restoration Act (S. 557)

Before the Committee on Labor and Human Resources,

United States Senate

March 19, 1987

I. CITY OF ST. LOUIS' HOSPITAL POLICY TOWARDS ABORTIONS

Since the Supreme Court's 1973 decisions regarding abortion, the City of St. Louis has taken, as a matter of public policy, a position against providing abortions at its hospitals.

Public opposition in both City of St. Louis and State of Missouri ranged from the St. Louis Mayor Alfonso J. Cervantes leading the Missouri Democratic delegation to the National Convention sponsoring a strong plank against abortion in 1972, State statutory enactments to protect public and private hospitals, and health care personnel from being required to provide or participate in abortions (see Sec. 197.032, R.S.Mo. 1973), St. Louis ordinance enactments attempting as far as possible against unregulated abortion, and the City's adopted policy of prohibiting the performance of abortions in its hospitals (except in cases of imminent threat of death to the mother).

CITY'S DEFENSE TO CHALLENGE OF ITS POLICY

After the Supreme Court decisions of Roe v. Wade and Doe v. Balton (410 U.S.113 and 1979) a case was devised to thwart the City's policy and impose the furnishing of abortions in City hospitals. Accordingly, the case was initiated in the Eastern District Federal Court styled Jane Doe, et al. v. John H. Poelker, Mayor of the City of St. Louis, Missouri, et al., No. 73-C-565 (A); which resulted in a judgment for the City.

This case was very hotly litigated and spanned four District Court rulings generally favorable to the City but successively reversed by the Court of Appeals, Eighth Circuit which was required to modify its opinions three times. (See: 497 F.2d 1063, 515 F.2d 541, and 527 F.2d 605). The litigation spanned four years.

From the final adverse judgment, the City applied for certiarori which was granted by the United States Supreme Court. After briefing and argument, the Supreme Court reversed the Court of Appeals, Eighth Circuit. The Supreme Court found no constitutional violation by the City in electing as a policy choice to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions. The Court further made clear that such a matter was a lawful choice open to states and cities adopted through democratic process. John H. Poelker, et. al.; Petitioners v. Jane Doe, etc., 432 U.S. 519, 53 L.Ed. 2d 528, 97 S.Ct. 2391. The holding of the U.S. Supreme Court in Poelker affirming the position of the City of St. Louis represents today the controlling constitutional law.

The City subsequent to this decision maintained as a matter of policy that in the operations of its own acute care hospital no elective abortions would be performed. This policy continued up until the closing of its City hospital and its operation on June 24, 1985. At this time the City entered into a contract (Exhibit 1) with St. Louis Regional Health Care Corporation (hereinafter "Regional") a not-for-profit corporation which was formed especially to provide for the indigent hospital care of residents, both of the City of St. Louis and the adjoining county. The contract entered into was for a period of ten (10) years. Regional acquired an acute care facility (hereinafter "Regional Hospital") to provide for its contractual obligations to the City.

A Board of Overseers was established which would determine both what services were to be provided and the level of those services. The contract specifically prohibited abortions being performed by Regional on any patients of the City. The County of St. Louis in its similar contract with Regional provided for the same prohibition. An ordinance of the City of St. Louis was passed, which authorized the City to enter into such a contract. (Exhibit 1)

The City has subsidized Regional for the acute care services rendered to its indigent patients in the approximate amount of Twenty-eight million dollars ($28,000,000.00) per year. A cost containment of this subsidy has occurred as a result of the contract between Regional and Washington University's Medical School for physicians' services.

MISSOURI LEGISLATION

The uniformity of the approach to abortion is reflected in the Missouri State Legislature which has also treated abortions differently from other medical procedures by enacting §376.805 R.S.Mo. 1986. That statute provides in pertinent part: "No health insurance contracts, plans or policies . . . shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium." (Exhibit 3)

II. RELATIONSHIP BETWEEN REGIONAL HOSPITAL AND WASHINGTON UNIVERSITY MEDICAL SCHOOL

St. Louis Regional Professional Services Corporation (hereinafter Regional) and Washington University executed a contract (Exhibit 4) whereby Washington University provides physicians for the services at Regional.

The purposes of the contract are stated as follows:

A. Improving and developing the quality of patient care and medical education at the Hospital;

B. Recruiting and retaining physicians for the Hospital;

C. Advancing patient care, teaching and research at the Hospital and other affiliated health care institutions;

D. Ensuring the provision of medical care to all persons at the Hospital regardless of their ability to pay;

E. Promoting quality medical care and other human services for the benefit of persons suffering from illness and for the benefit of the sick and injured generally;

F. Taking an active part in planning for and promoting of the general mental and physical health of the community; and

G. Providing for a responsive and cost-effective administrative organization and information system as a means of ensuring management and accountability in the accomplishment of the aforesaid purposes.

Missouri courts have recognized the benefits provided to hospitals who have association or affiliation with teaching hospitals and in particular Washington University's Medical School. Dillard v. rowland, 520 S.W.2d 81 (Mo. App. 1974). See also, Taylor v. Baldwin, 247 S.W.2d 741 (Mo. banc 1952).

By contract Washington University is required to abide by "policies and procedures of Regional" and all "county or municipal law, rule, ordinance or regulation." Therefore the University and its staff are bound by the agreement between St. Louis City and Regional which provides "[t]he corporation (Regional) shall not provide directly or by contract induced abortion or abortion referrals, except when necessary to save the life of the mother to any authorized patients of the City or other non-authorized patients of the City." The agreement was approved by the St. Louis Board of Aldermen and signed by the Mayor thus becoming a valid ordinance of the City of St. Louis, enforceable by law.

The physicians and staff of Regional are precluded by ordinance to perform abortions except when necessary to save the life of the mother. Regardless of the policies implemented by Washington University in regard to abortion, those students, physicians and staff assigned, employed, and those conducting research or studying at Regional are precluded from administering elective abortions.

I have studied various legal memoranda and other materials dealing with the effects of the "Restoration Act" on teaching hospitals. The proponents of the bill concede that it would extend Title IX to the "educational activities" of any teaching hospital. They concede that the hospital would be required to provide coverage of abortions in the health benefits plans which it provides for teaching staff and others connected with the teaching program.

That would create a conflict with the current insurance policy at Regional Hospital. As I noted earlier, by state law, health insurance plans in Missouri do not include abortion, except to save the life of the mother.

A number of legal authorities believe that Title IX would require that teaching hospitals treat abortion on the same basis as other "medical procedures" for all purposes. If that interpretation is adopted by the courts or by administrative agencies, it will create more severe problems for Regional Hospital.

As chief legal advisor of the City, recognizing that a great deal of uncertainty exists, through different interpretations of this "Civil Rights Restoration Act," it would be my advice to Regional to cancel its contract with Washington University Medical School rather than risk exposure to a number of suits by women who have been denied abortions. The risk of the potential liability from such suits would necessitate such advice. I recognize that there is an argument limiting the reach of the legislation to the "educational activities" of the hospital. The contrary argument that the legislation would open a public hospital, which utilizes the teaching program of a medical school to provide elective abortions has also been considered by me. It appears clear that no legal scholar can predict with certainty how such legislation would be interpreted. As a city attorney defending various lawsuits brought under various federal statutes, I have seen the courts extend rights beyond what the legislative body intended. This uncertainty compels taking a cautious approach lest the City take a chance on being liable for substantial damage claims.

The passage of this legislation without the Tauke/Sensenbrenner Amendment would leave Regional with two unacceptable alternatives. Regional would be required to conform all operations of the hospital to the principle that abortion is like other medical procedures; treating abortion differently results in discrimination based on sex. Regional either would be required to perform abortions or sever their relationship with Washington University and further be precluded from the benefits any teaching institution could provide to Regional and its patients. It would be my advice to Regional to sever all affiliation and/or contractual relationships with the medical school or in the alternative have the City change its policy towards the funding of elective abortions. The latter appears unlikely considering the previously mentioned historical background.

III. EFFECT ON REGIONAL HOSPITAL OF NOT HAVING A MEDICAL SCHOOL AFFILIATION

Without a university medical school affiliation, Regional Hospital would lose important benefits that are vital to its goal which is the servicing of the health and hospital needs of the indigent of the City of St. Louis. These are as follows:

1. Regional serves many patients who have no physician of their own. In order to serve this large number of patients, Regional has to have sufficient manpower at its hospital and clinics on constant call and only through the use of interns and residents of a medical school can this cost be properly contained.

2. The nature of the indigent patients' problems and their complexities require currently trained physicians which only a teaching institution can supply.

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April 17, 1987

The Honorable Edward M. Kennedy
The United States Senate
Washington, D.C. 20510-6300

RE: S.557

Dear Senator Kennedy:

Please find enclosed a copy of the questions presented by Senator Hatch and my responses to be included in the official record of the Senate proceedings on S.557.

Very truly yours,

James J. Wilson

James J. Wilson
City Counselor

JJW:pml

Enclosure

QUESTION #1

Can you more fully explain the fact situation surrounding your hospital in St. Louis; its relationship to nearby educational institutions; the patients it serves?

ANSWER #1

St. Louis Regional Medical Center is a 300 bed private not-for-profit hospital established in June, 1985 to replace St. Louis City and St. Louis County Hospitals. Pursuant to contracts with the City of St. Louis and St. Louis County, Regional provides medical care to indigent residents. The City of St. Louis subsidizes Regional for the acute care services rendered to its indigent patients at approximately twenty-four million dollars per year.

Regional secures physician services through contracts with Washington University and St. Luke's Hospitals for interns, residents and attending physicians. Regional could not provide care to the large indigent population it serves without the post graduate medical education programs. An additional benefit of the contract between Regional and Washington University is a cost-containment of the City's subsidy to Regional. [Cost-containment refers to the savings realized through medical school performance in the academic function rather than open-market costs for equivalent services.]

QUESTION #2

You mention that within the contract that the City of St. Louis has with this hospital, there is prohibition against the performance of abortion services. How would this private contractual obligation be affected by the passage of S.557?

ANSWER #2

It is undisputed that the passage of S.557 would cause Regional to be subject to its provision via Regional's relationship with Washington University. Consequently Regional would be required to provide coverage of abortions in its health benefit plans which it provides to the teaching staff and others connected with educational programs. This creates a conflict with the health insurance policies at Regional.

Of even greater concern is that S.557 would require Regional as a teaching hospital to treat abortion on the same basis as other "medical procedures". Historically, St. Louis City Hospital and Regional have not performed abortions except to save the life of the mother. Accordingly, the contract between Regional and St. Louis City specifically provides that abortions shall not be performed.

To prevent Regional and St. Louis City from risk of liability based on this possibly, Regional has two choices, administer abortions or severe its relationship with Washington University; both equally unacceptable.

QUESTION #3

In your statement you state that Regional Hospital is not owned by Washington University, and yet this tangential relationship to the University would be enough to require your hospital to cover abortion services? Would it require that your hospital provide abortions to the general public?

ANSWER #3

My research of various articles and memorandum indicate that it is conceded that Regional would be subject to S.557 as a result of its contract for physician services with Washington University.

The very purpose of S.557 is to broaden the inclusion of the Education Act to overcome its limitation of scope as construed by the Supreme Court in the Grove College case. As a certain consequence, future court interpretations will most likely implement the will of Congress as seen to include all facets of involvement such as hospital employees and patients serviced by covered educational institutions.

Regional would be required to conform all operations of the hospital to the principal that abortion is like other medical procedures. It appears to me a very short step from applying this standard to employees and students of Regional to the general public. The willingness of the courts to expand liability would force the City to take precautionary measures to ensure Regional's compliance with this legislation.

QUESTION #4

It is my understanding that Missouri has passed a law prohibiting that abortion services be covered in group health plans. What would be the impact on that state law if S.557 were enacted?

Would enactment of S.557 impede the private contractual obligation relating to abortion that currently exists between your hospital and the City of St. Louis, and also overturn Missouri state law?

ANSWER #4

A. The Missouri statute §376.805 R.S.Mo. 1987 you refer to is as follows:

> 376.805. Elective abortion to be by optional rider and requires additional premium--elective abortion defined.--1. No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium. For purposes of this section, and **"elective abortion"** means an abortion or to prevent the death of the female upon whom the abortion is performed.
>
> 2. This section shall be applicable to all contracts, plans or policies of:
> (1)All health insurers subject to this chapter; and
> (2)All nonprofit hospital, medical, surgical, dental, and health service corporations subject to chapter 354, R.S.Mo. and
> (3)All health maintenance organizations.
>
> 3. This section shall be applicable only to contracts, plans or policies written, issued, renewed or revised after Septermber 28, 1983. For the purposes of this subsection, if new premiums are charged for a contract, plan or policy, it shall be determined to be a new contract plan or policy.

If S.557 were enacted any teaching institution or hospital subject to those provisions would be in direct conflict of §376.805. S.557 would require that abortion be treated like all other medical procedures while §376.805 specifically treats abortion differently. It would be impossible for any Missouri institution subject to S.557 to comply with the provisions of §376.805.

Enactment of S.557 would override the current contract between Regional and the City of St. Louis because that contract, the provision of which is also an ordinance, specifically prohibits elective abortions.

B. Besides Missouri statute 376.805, the overlay of S.557 upon Missouri hospital operations would impact upon Sections 188.105 - 188.110 R.S.Mo. creating major problems of staffing and administration. (See copies of Sections 188.105 and 188.110 R.S.Mo. enclosed.)

QUESTION #5

You have stated that it would be detrimental for your hospital were you faced with the choice of severing your ties with Washington University in order to avoid violating your contractual obligation to refrain from providing abortion services. Would you elaborate as to the effect on the quality and cost of providing care to the indigent population at St. Louis Regional if you severed ties with Washington University?

ANSWER #5

Severing Regional's tie with Washington University would deliver a fatal blow to the operation of Regional. Aside from the obvious benefits that a University, the caliber of Washington University confers on Regional and its patients, the relationship between Regional and Washington University serve to keep Regional operational. Without the supply of physicians and interns the University supplies, Regional could not operate because Regional is unable to attract private physicians. As a hospital subsidized by local government and serving indigent patients, Regional cannot offer a physician the benefits and opportunities that are available at privately operated hospitals.

In addition, the contract between Washington University and Regional reduces operational costs because Regional offers the University a forum in which to train its students.

Regional cannot exist without a relationship to Washington University or another teaching institution.

188.105. Discrimination by employer prohibited because of failure of employee to participate in abortion—exceptions.—1. It shall be unlawful:

(1) For an employer:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's refusal to participate in abortion;

(b) To limit, segregate, or classify his, her, or its employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's refusal to participate in abortion;

(c) To discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden under sections 188.100 to 188.120 or because he or she has filed a complaint, testified, or assisted in any legal proceeding under sections 188.100 to 188.120;

(2) For any person, whether an employer or employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under sections 188.100 to 188.120, or to attempt to do so.

2. Notwithstanding any other provisions of sections 188.100 to 188.120, the acts proscribed in subsection 1 of this section shall not be unlawful if there can be demonstrated an inability to reasonably accommodate an individual's refusal to participate in abortion without undue hardship on the conduct of that particular business or enterprise, or in those certain instances where participation in abortion is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

3. Nothing contained in sections 188.100 to 188.120 shall be interpreted to require any employer to grant preferential treatment to any individual because of such individual's refusal to participate in abortion.

(L. 1986 H.B. 1596)

188.110. Discrimination by colleges, universities and hospitals prohibited—no requirement to pay fees, when.—1. No public or private college, university or hospital shall discriminate against any person for refusal to participate in abortion.

2. No applicant, student, teacher, or employee of any school shall be required to pay any fees that would in whole or in part fund an abortion for any other applicant, student, teacher, or employee of that school, if the individual required to pay the fee gives written notice to the proper school authorities that it would be in violation of his or her conscience or beliefs to pay for or fund abortions. The school may require the individual to pay that part of the fees not funding abortions, if the school makes reasonable precautions and gives reasonable assurance that the fees that are paid are segregated from any fund for the payment of abortions.

(L. 1986 H.B. 1596)

376.805. Elective abortion to be by optional rider and requires additional premium—elective abortion defined.—1. No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium. For purposes of this section, an "elective abortion" means an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed.

2. This section shall be applicable to all contracts, plans or policies of:

(1) All health insurers subject to this chapter; and

(2) All nonprofit hospital, medical, surgical, dental, and health service corporations subject to chapter 354, RSMo; and

(3) All health maintenance organizations.

3. This section shall be applicable only to contracts, plans or policies written, issued, renewed or revised, after September 28, 1983. For the purposes of this subsection, if new premiums are charged for a contract, plan or policy, it shall be determined to be a new contract, plan or policy.

(L. 1983 S.B. 222 § 1)

The CHAIRMAN. We will next hear from Marcia Greenberger. We are glad to have the managing attorney for the National Women's Law Center here.

Ms. GREENBERGER. Thank you, Senator Kennedy.

I have written testimony, and in the interest of time, I would ask that my statement be introduced for the record.

The CHAIRMAN. All of the statements will be printed in their entirety as if read for the hearing record.

Ms. GREENBERGER. Thank you.

I will then summarize some of the points that I made in the written testimony.

I am pleased to be here today. I am the managing attorney of the National Women's Law Center. I am here to urge the quick passage of S. 557. This legislation is needed to assure that we have strong laws prohibiting discrimination on the basis of race, national origin, sex, disability and age.

Because I have worked particularly in the area of sex discrimination, my testimony will be directed toward the title IX aspects of the bill. But I do want to emphasize the overlapping nature of discrimination and the similarity of approach of the statutes. All aspects of this bill are of critical importance and are properly addressed together.

I have listed on the first page of my written testimony a number of the title IX cases that I have been involved in as co-counsel. Title IX enforcement is an issue that the National Women's Law Center and I personally have been involved with actively since 1972, when title IX was passed.

It is clear to me, because of the *Grove City* decision, that there has been a severe weakening of civil rights protections in this country. And I can only state to you, Senator Humphrey, in as strong terms as possible, how severe that weakening has been.

Title IX is the only Federal law that prohibits sex discrimination in education. When it was weakened, we have seen very serious consequences. And devastating damage has been done to title VI, section 504, and the Age Discrimination Act as well. Moreover, title VII, which you did, Senator Humphrey, refer to earlier this morning, has no protections for employment discrimination on the basis of handicap. So whatever the status of title VII, it certainly has nothing to do with 504 in any regard.

In my written testimony, which I will not repeat here, I have summarized how important title IX has been in the area of education and what progress has been made because of it. I also summarized how much farther we have to go as a country in eliminating sex discrimination in education and how many challenges that still remain. Rather, however, than facing those challenges, we are now in a situation of having to restore the basic law that allowed us to move forward. We are not only now not moving forward, but we are slipping back.

The effects of the severe narrowing of the *Grove City* decision are building. Immediately after the decision, the Department of Education began to close complaints and narrow interpretations, even where discrimination had been found. While originally the Department of Education thought it could investigate and even found discrimination, after *Grove City*, those complaints were dropped. By its own count, the Office for Civil Rights, just in the Department of Education alone, dropped over 60 complaints in the months right after the *Grove City* decision.

We have a report which I would either like to have as part of the record or the file in this hearing, "Federal Funding of Discrimination: The Impact of *Grove City College v. Bell*", which picks out selected examples of other cases that have been dropped since those original 60. It is not an exhaustive report by any means, but it lists over 70 additional cases after the first 60. These 70 represent cases involving school districts, higher education systems, intercollegiate athletic, interscholastic athletic cases. Those are not 70 people; these are 70 instances with many, many, many individuals' rights at stake. There are examples of cases dropped under section 504, under title IX, under title VI, and the Age Discrimination Act. The report includes court decisions; it includes administrative agency complaints—all dropped. These people have nowhere else to turn.

I cannot review all of the examples now, but I do want to pick out four cases in this report to discuss.

The CHAIRMAN. We will take the report and include it in the record in its entirety.

[The report referred to follows:]

NATIONAL WOMEN'S LAW CENTER
[illegible] P STREET, N.W.
WASHINGTON, D.C. [illegible]
[illegible]

FEDERAL FUNDING OF DISCRIMINATION
THE IMPACT OF
GROVE CITY COLLEGE v. BELL

> "the allegation of discrimination, even if true, is not part of a program or activity that receives or benefits from Federal financial assistance . . ."
> CASE CLOSED.
>
> Letter from Office for Civil Rights to Carmel Central School District.

MARCIA D. GREENBERGER
C. A. BEIER

Marcia D. Greenberger is Managing Attorney of the National Women's Law Center. C. A. Beier is an attorney with the National Women's Law Center, and is a part of the Georgetown University Law Center Women and Public Policy Fellowship Program. The authors wish to thank Martha Platt, a second year law student at the University of Pennsylvania; the NAACP Legal Defense and Educational Fund, the Equality Center, and the Disability Rights Education and Defense Fund for their help in the preparation of this report.

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Attachment 1

Office for Civil Rights, Department of Education
List of Cases Affected by Grove City as of 10/30/84

INTRODUCTION

Title IX is the only federal law intended to prohibit all aspects of sex discrimination in education. Yet, when the U.S. Supreme Court decided the case of Grove City College v. Bell on February 28, 1984, it reduced Title IX to a law that is like a piece of swiss cheese -- it has more holes than it has coverage.

The weakening of Title IX was only the first step. The three other basic civil rights laws which have the same structure -- Title VI of the Civil Rights Act of 1964 (which prohibits race and national origin discrimination), Section 504 of the Rehabilitation Act (which prohibits discrimination on the basis of disability) and the Age Discrimination Act -- were enforced the same way. After the Grove City College case, they too were turned into a mockery of their former strength and effectiveness.

Before Grove City, the rule was simple -- if an institution or organization received money from the federal government, it could not discriminate. If the institution was found to be discriminating in violation of the statutes, the government began proceedings against it, or a court claim was filed by an affected individual. Ultimately, if the organization refused to stop the discrimination, it faced the loss of federal assistance on the principle that no organization that discriminated on the basis of race, national origin, sex, disability or age should be able to do so using federal funds.

The Grove City decision has turned civil rights protection on its head. Now, an organization that receives federal money in one department has been free to discriminate with impunity in any other department that does not directly receive those funds. For example, a university that receives federal assistance for its math program may run an athletics program in which women athletes receive inferior coaching, have lesser facilities and have fewer teams than male athletes. Or, a student might suffer sexual harassment by a professor, so long as it does not occur in the math department. Now, the government will not even investigate such claims of discrimination, and the courts will not decide if the discrimination is actually taking place.

Since the Grove City decision, in school after school numerous claims of sex discrimination in education have gone unaddressed because federal funds could not be traced directly to the department, professor, or activity accused of discrimination, even though the school itself receives large amounts of federal funds. The pattern has been repeated in Title VI, Section 504 and Age Discrimination cases as well, in all types of institutions around the country. Immediately after the Grove City decision, the Department of Education's Office of Civil Rights (OCR), by its own count closed, limited or suspended 63 claims because of the lack of direct federal funding. That was just the beginning.

Besides narrowing or closing investigations of complaints brought by individuals, OCR has decreased its own reviews of compliance under the four civil rights laws. Before the Grove City decision, if a school received federal money, OCR initiated periodic "compliance reviews" to ensure that the school was not discriminating. Now, in order to conduct such a review, OCR must find federal funds actually going to each school program it wishes to investigate. As a result, OCR has dropped reviews in many cases, or simply never opened them.

Grove City's effect has continued beyond its initial chilling of OCR's enforcement. Court cases and administrative complaints continue to be closed or limited because federal funding cannot be traced directly to the part of the institution where the discrimination actually takes place. And, we are most recently seeing extreme interpretations of the Grove City case, narrowing coverage even further. Some examples follow, both of court cases and of administrative actions defeated by Grove City.

COURT CASES

o Bennett v. West Texas State University, 799 F.2d 155 (5th Cir. 1986) This case alleged sex discrimination in the entire intercollegiate athletic program, including scholarships, facilities, coaching, funding and opportunities. The University received federal money in the form of student financial aid, college work-study, interest subsidies and grants for improvement of physical facilities and, when the complaint was filed, received unrestricted revenue-sharing funds. However, this summer, the Court ruled that the athletics department did not receive federal funds and dismissed the entire case, including the scholarship portion.

o O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986). A woman hired to teach physical education and coach women's basketball charged that her firing was in violation of Title IX. The college had received federal monies to support its educational programs, but the Court found those funds, while covering the plaintiff's teaching activities, did not cover her coaching. Because she had alleged that the discrimination occurred while she was coaching rather than teaching, her claim was dismissed.

o Gallagher v. Pontiac School District, 807 F.2d 76 (6th Cir. 1986). A handicapped student's case was dismissed under Section 504 because the court held that there was no federal assistance to the specific special education program in which the student participated.

o Foss v. City of Chicago, 640 F.Supp. 1088, (N.D.Ill. 1986). The court held that a handicapped firefighter who claimed to be improperly fired on the basis of a disability could not sue the Chicago Fire Department under Section 504 because he was not employed in a program specifically receiving federal financial assistance. In fact, the Fire Department received federal funds, but the court held that the federal funds did not cover the specific duties performed by Foss, and therefore he had no protection under Section 504.

o Russel v. Salve Regina College, 649 F. Supp. 391 (D. R.I. 1986). No cause of action was found under Section 504 in this case in which a person alleged discrimination in a nursing program where the only federal funds received by the college were through financial aid to students.

o Chaplin v. Consolidated Edison Company, 628 F.Supp. 143 (S.D.N.Y. 1986). In this Section 504 case, the court held that receipt of CETA and WIN training grants did not suffice to invoke Section 504 protection of applicants claiming they were denied employment on the grounds that they had epilepsy, unless they were part of the CETA or WIN programs. Under this decision, Section 504 protection was limited only to those persons participating in the training programs.

o Zangrillo v. Fashion Institute of Technology, 601 F. Supp. 1346 (S.D.N.Y. 1985). A woman faculty member of the Fashion Design Department claimed that her seniority rights accumulated while absent from work on maternity leave were denied her. Both the Department of Education and the federal district court rejected the plaintiffs' maternity leave claim because she had not shown the direct connection between the federal money the school received and her department.

o Walters v. President and Fellows of Harvard College, 601 F. Supp. 867 (D. Mass. 1985). A former employee of the Building and Grounds Department of Harvard University alleged that she was harassed on the job and ultimately forced to quit because of her sex. The court agreed that employment discrimination was prohibited by Title IX but dismissed her claim because it found that the maintenance of the school buildings where teaching took place was not related directly enough to the education programs at Harvard receiving federal funds.

o Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985). The plaintiff, a psychiatry student, claimed she was given a failing grade in a course because she had refused her professor's sexual advances. The district court dismissed her Title IX claim because the professor she accused of the sexual harassment received no federal grant money even though Temple University receives millions of dollars of federal funds.

o Keenan v. Traverse City Area Public Schools, No. G85-214-CA7, oral op. (W.D. Mich. 1985). This was a Title IX action brought in district court by a junior high school boy, who had been prevented from playing volleyball on the girls' team (the school had no boys' team). The District Court judge ruled in an oral opinion that, in spite of his conclusion that the boy was being discriminated against, because no federal funds went directly to either the volleyball program or the athletic program, the school did not have to comply with Title IX in these programs.

o Haffer v. Temple University, No. 80-1362, Order (E.D. Pa. Feb. 14, 1985). This is an ongoing case that began as a Title IX complaint against all aspects of Temple University's intercollegiate athletic program. The claim alleged that the athletic program did not provide women with equal opportunities, facilities, scholarships, coaching, training and the like. The Third Circuit Court of Appeals initially held that the entire program was covered by Title IX, but in 1984, after the Grove City decision, the lower court limited the Title IX claim to the sole issue of the allocation of athletic scholarships. The Court dismissed the rest of the Title IX claims.

o Greater Los Angeles Council of Deafness v. Zolin, County of Los Angeles, 607 F. Supp. 175 (D. Cal., 1984). The Court held that refusal to seat deaf jurors may not be challenged under Section 504 unless federal funds were specifically dispersed to the superior court.

o Mabry v. State Board for Community College and Occupational Education, 587 F. Supp. 1235 (D. Colo. 1984). A physical education instructor at Trinidad State Junior College claimed that her firing was discriminatory, citing the fact that two male instructors were retained while she was laid off. The court ruled that she could not bring a Title IX claim because (1) the school received no federal money that was designated for the program in which the plaintiff taught; and (2) the non-designated federal money that the school received was not used to pay instructors' salaries in the program in which the plaintiff taught. The court made no mention of federal money being used by the physical education program for purposes other than salary.

ADMINISTRATIVE DECISIONS

The following two key Administrative decisions, which establish principles applying to Title VI, Title IX, Section 504 and the Age Discrimination Act, demonstrate how rigidly the Department of Education is interpreting Grove City, and how narrow coverage has become.

o In the Matter of Pickens County School District, Docket No. 94-IX-11 (Dept. of Ed. Civil Rights Reviewing, Authority Decision, Oct. 28, 1985). The Department initiated an action against the Pickens County School District because of its policy of maintaining sex-segregated physical education classes in violation of Title IX. The Reviewing Authority dismissed the enforcement proceeding, on the grounds that Pickens County received no federal funds expressly earmarked for the physical education program, even though it received federal funds which could have been used for that program.

o In the Matter of Lauderdale County School District, Docket No. 84-504/IX-8 (Dept. of Ed. Civil Rights Reviewing Authority Decision, Aug. 21, 1986). The Lauderdale County School District, Alabama, was found by OCR to be in violation of Title IX and Section 504, because of the school board's policy with respect to a teacher's handicap and marital status. The Reviewing Authority remanded the case to the administrative law judge to determine whether the receipt of federal impact aid -- monies which can be used by a school for any purpose -- were actually used by the school in the program covering the teacher. Under this approach, a school is free to channel federal monies into programs it chooses to be covered by the civil rights protections, and away from programs where it wishes to be free to discriminate.

Title VI

o Community High School District #218, #05861010, #05861084.

These two Title VI complaints alleged race discrimination in a school's disciplinary actions. In one, the actions led to a student's temporary suspension. Both were closed by OCR for lack of program-specific federal funding. In one case, an OCR memorandum regarding the closure stated that the complaint could have survived the Grove City jurisdictional inquiry if Department money had gone into construction of the building where the action leading to the discipline took place, even though the disciplinary action that prompted the complaint was taken by school administrative personnel, the superintendent, and members of the board of education who supervised the entire school system.

In the second case, according to a recipient status calculation, the respondent received $642,395 in federal money. But, because the money did not go to an identifiable program in which the discrimination occurred, e.g. discipline, and because the discrimination was not alleged to involve "classwide exclusions or denials of access that deny participation in all education programs, including those that are federally assisted," no OCR jurisdiction was found.

o Millard Public Schools, #07861029.

This complaint alleged that school officials failed to take appropriate disciplinary action against a student who called the son of the complainant a "nigger" and assaulted him in a school locker room. After the father sought public attention and a remedy for the incident, the family was subjected to many threatening letters and phone calls. OCR closed the investigation for lack of jurisdiction, because it found there was no program-specific federal money involved in the school's inaction.

o Haddon Heights School District, #02841065.

A Black high school student filed a complaint alleging that her school's chapter of the National Honor Society had failed to induct her because of her race. In spite of being ranked fifth in her class and participating in a wide variety of extracurricular activities, she was not among the sixteen students invited to join the Society. OCR closed the case because it found the alleged discrimination did not occur in a program or activity which was a direct recipient of federal financial assistance from the Department of Education.

o University of California at Davis, #09842120.

The complainant was an East Indian physician and a psychiatric resident in the Child Psychiatry Training Program at the University. She alleged that she had been discriminated against on the basis of national origin and sex in the assigning of work, in work evaluations, and in the treatment of her request for maternity leave. The Department of Child Psychology received financial assistance through the work-study program, but OCR claimed it had no jurisdiction over the complaint because the alleged discrimination was not related to the financial aid office. The case was closed.

o Victor Valley College Child Development Center, #09862179.

The complainant alleged that her son was not advanced within the Child Development Center's grade levels because he was Black. Victor Valley College received over $340,000 in Department of Education monies, but OCR decided jurisdiction did not exist because the Center itself was not a direct recipient of funds. OCR dropped the complaint.

o University of California, Department of Medicine, Division of Endocrinology, #09862198.

A professor of medicine charged that Title VI had been violated when other staff members harassed and threatened him. After gaining access to his personnel file, he concluded that this treatment was the result of his national origin. Although the University received financial assistance from the Department of Education, OCR did not find jurisdiction because the professor's specific program was not a recipient.

o Deloux School of Cosmetology, #09862170.

The complainant alleged that she and other Black students at the school were treated differently, harassed, and derided in violation of Title VI. The school received Department of Education funds in the forms of National Direct Student Loans, Secondary Education Opportunity Grants, and Basic Education Opportunity Grants, but OCR claimed it lacked jurisdiction because the money only went toward "Campus-Based" programs.

o York College, #03852001.

The complainant was a minority male who alleged that his professors discriminated against him on the basis of race and sex when his requests to be excused from class were treated differently from requests by other students. OCR closed the case because the Biology Department in which the discrimination allegedly occurred was not a direct recipient of federal funds. In light of Grove City, OCR concluded that the case could not be pursued.

o Hilltop Beauty School, #09834004.

A student complained of sexual harrassment and race discrimination before the Grove City decision. OCR investigated the sexual harrassment Title IX allegations and found them to be without merit, but it did require the school to comply with procedures required by Title IX regulations, including revisions of its nondiscrimination policy statement. OCR closed the complaint without investigating the race discrimination claim after -- and because of -- Grove City.

o San Francisco State University, #09842165.

A student at the University was required to complete an internship as part of his coursework; the University placed him at the Central City Seniors Unit, where he was allegedly discriminated against in violation of Title VI. OCR dropped the case because the Senior's Unit itself was not a recipient of ED funds.

Title IX

o Carmel Central School District, #02-1230.

This complaint alleging sex discrimination in interscholastic athletics was put on hold pending the OCR Reviewing Authority's decision in Pickens County School District. After that decision, the complaint was closed; in OCR's words, "the allegation of discrimination, even if true, is not part of a program or activity that receives or benefits from Federal financial assistance . . . ."

o Christopher Newport College, (docket number unknown).

A female employee of the college athletic department claimed she was the victim of sex discrimination because her male colleagues with similar responsibilities received disproportionate salary increases and because female athletes were given little recognition compared to male athletes. OCR closed the case, claiming it was unable to trace funding directly to the athletic department at the College.

o University of California at Davis, Medical School, #09852085.

The complainant was a first year medical student who alleged that she had been sexually harassed by a professor who made explicit sexual remarks to her, offered to give her better grades in exchange for sexual favors, and finally threatened to use his alliances with other professors to manipulate her grades. Although the medical school received Federal funding through the Department of Education, no money was earmarked for the educational program for first year students or the Department of Surgery in which the professor taught. OCR closed the case in January 1985 because it decided the Grove City "program or activity" requirement could not be satisfied.

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Nogales Unified District #1, #09861056
Flowing Wells Unified District #8, #09861057
Douglas Unified District #27, #09861058
Gilbert Unified District #41, #09861059
Marana Unified District #6, #09861033
Gerard Catholic High School, Phoenix, #09861041.

These are 14 of a total of 24 Arizona recipients alleged to have discriminated against female athletes, when they scheduled the girls' interscholastic basketball team to play in the spring and the softball team to play in the winter. The complaint alleged that because of this scheduling, the participating students were put at a substantial disadvantage for college recruiting purposes. Although some of the districts were subject to OCR jurisdiction, the 14 complaints listed above were closed because federal financial assistance was not specifically used for interscholastic athletics programs.

o Hampshire College, #01862007.

The complainant alleged that the college was violating Title IX by offering student health insurance which discriminated on the basis of sex. Specifically, the allegations stated that the "offending policy does not treat pregnancy and related disabilities the same way as any other temporary disability." OCR requested and received from the college extensive records regarding the health insurance plan and the use of federal financial assistance. Based on its analysis of these records, OCR determined that Hampshire College did operate a student health plan but dropped the case because "such a plan is not part of a program or activity that receives or benefits from Federal financial assistance from the Department."

o Adelphi University (docket number unknown).

The complainant alleged that the university discriminated against students on the basis of sex when it offered a student health insurance plan which treated pregnancy and related disabilities less favorably than other temporary disabilities. OCR established that the university itself was the policy holder, that the Risk Management Coordinator selected and procured the insurance policy, and that students were automatically billed by the Office of Student Accounts, to which students paid their premiums. The University Health Services, within the School of Nursing, distributed claim forms, submitted claims, and provided health care and referrals. Still, OCR dropped the case because the plan was not operated by "an organizational unit" which benefited directly from federal assistance.

- Jefferson State Junior College, #04852058.

The complainant student alleged that the college was violating Title IX by treating students differently on the basis of sex. Specifically, it was alleged that the student health insurance offered at the college treated pregnancy related conditions differently from other temporary disabilities. OCR established that the college did administer the plan by holding the master policy, providing students with a plan brochure during registration, and including an application with the brochure. OCR also found that the student financial aid program received over $1,400,000 from ED. Because the plan was administered by the Office of Student Activities in the Department of Student Development, for which ED funds were not earmarked, OCR dropped the case.

- Skidmore College (docket number unknown).

The complainant alleged that the college was in violation of Title IX in offering student insurance which discriminated on the basis of sex. In its preliminary investigation, OCR determined that the college did offer an accident and sickness insurance plan and that it had selected the carrier. Furthermore, the Office of Financial Services was responsible for collecting and forwarding student premiums to the carrier, handled student complaints, and forwarded an application and brochure to each student. OCR dropped the complaint, however, because the plan was not operated by an office of the college which received federal dollars.

- Downers Grove S.D. #58, 05855006.

OCR began a compliance review of this school district to examine assignments to physical education classes. Although the district received federal financial assistance, OCR found that no federal monies were targeted for physical education programs in the district. Citing the Grove City and Pickens County decisions, OCR closed the case for lack of jurisdiction.

- Los Angeles Southwest College, #09846001.
- Victor Valley Community College, #09846004.

OCR began compliance reviews at both of these schools to investigate the area of intercollegiate athletics, focusing on possible Title IX violations. Both were closed in August 1984 because of a policy memo interpreting the Grove City decision.

- Birmingham Southern College, #04852055.

The complainant alleged sex discrimination in the health insurance plan offered by the college, which administered the plan through its personnel office. Because the office itself was not a recipient of ED earmarked funds, the case was closed. Over $530,000 in ED funds were received by the college in FY 85.

o Augustana College, #05852071.

OCR received a sex discrimination complaint against the college which alleged that the college offered, endorsed or provided a student health insurance plan which treated pregnancy and related conditions less favorably than other covered temporary disabilities. OCR notified the college that, in light of Grove City, it must trace ED funds to the specific program in which the plan was administered. OCR determined that Augustana selected the carrier and was responsible for collecting and transmitting students' premiums to the underwriter. OCR closed the case, however, stating that this administrative activity did not occur in a program which benefited from ED funding.

o St. Louis University, #07852049.

The complainant alleged that the university had violated Title IX by offering students a health insurance plan which discriminated on the basis of sex. OCR conducted a preliminary investigation and then closed the case, citing its lack of jurisdiction over "the program area" of the complaint.

o Eastern Montana College, #08852021.

OCR received a complaint alleging that Eastern Montana College had violated Title IX by offering students a health insurance plan that did not treat pregnancy and related conditions as favorably as other temporary disabilities. OCR closed the case three months later because the specific program which was the subject of the complaint did not receive ED monies.

o Grand Canyon College, #09862066.

The complainant alleged that this school was discriminating on the basis of sex in offering a health insurance plan which treated pregnancy and related conditions less favorably than other temporary disabilities. OCR established that the college's Business Office was directly involved in administering the plan to students but dropped the case since no ED funds were earmarked for that office.

Section 504

o University of Charleston, #03842040.

This case, filed by a man with epilepsy, alleged discrimination in job assignment, job treatment, salary, and discharge. The closure letter sent to the complainant, who had filed his first papers nearly four years before, states specifically that the OCR would have proceeded with an investigation before Grove City but lacked jurisdiction following the decision.

o Mayfield City School District, #15-86-1019.

The complainant bus driver in this case alleged that the district's refusal to promote him and his eventual discharge were based on discrimination because of his handicap. His companion age discrimination allegation was transferred to the EEOC. Although the District received more than a quarter of a million dollars from the federal government for the 1985-86 school year alone, the OCR found no jurisdiction because the district got no federal financial assistance "for the purpose of providing transportation or for the purpose of paying the salaries of individuals who drive or operate District buses."

o Affton 100 School District, #07861036.

In this complaint, the mother of an emotionally disturbed teen-ager alleged that her son's history teacher called him "retard" and "stupid" and refused to let him tape lectures for exercises in note taking, despite previous approval of such exercises because of his graphic-motor skill difficulties. It took OCR just over two weeks to close the case for lack of jurisdiction because of Grove City.

o Johns Hopkins University, School of Medicine, #03862008.

The complainant was a handicapped applicant to the Human Genetics Program in the University's medical school. Confined to a wheelchair, she inquired from program administrators what arrangements had been made to make the program accessible. She was told that the facilities which housed the program were not accessible. OCR concluded that it had no jurisdiction because federal monies from the Department of Education could not be traced to the Human Genetics Program specifically.

[NOTE: the complaint was transferred in March 1986 to HHS since the program received a $133,000 grant from NIH.]

o West Hills Community College, #09862173.

A mother filed a complaint on behalf of her son, who was confined to a wheelchair, alleging that the college was in violation of Section 504 because its men's dormitory was inaccessible to those with severe handicaps. Although the college received financial support from the Department of Education, the complaint was dropped because no monies went directly to finance housing on campus.

- Teachers College, Columbia University, #02842002.

The complainant was a handicapped manuscripts curator in the college library who claimed that he lost his job as a result of discrimination in violation of Section 504. The OCR investigator concluded that OCR had no jurisdiction in light of the Grove City decision.

- Columbia College, #07842025.

A dyslexic student at Columbia College charged the school with discrimination on the basis of handicap, when a sociology professor there refused to modify examinations to enable the student to take them. The case was dropped in light of the Grove City decision: no jurisdiction could be established because the Sociology Department itself did not receive federal financial support.

- Rutland School District, #01861009.

A handicapped teacher charged the Rutland School District with discrimination in violation of Section 504 when it allegedly failed to list her as an available substitute instructor. In addition, she charged the District with retaliating against her following an earlier complaint. Although the school district was a recipient of federal funds, OCR dropped the case because the Arts and Humanities program within the system was not a direct recipient.

- Logan College of Chiropractic, #07852009.

A student suffering from a chemical imbalance, who had completed seven semesters of credited work, complained when he was not permitted to complete his course work and to graduate. He alleged that this treatment was the result of discrimination against him because of his disability. Although the college received work-study monies from the Department of Education, OCR dropped the case because funds could not be traced directly to the "educational programs and activities" operated by the school.

Age Discrimination Act

- Lockport High School District #205, #05861036.

The complainant in this case alleged that she was discriminated against on the basis of age when the district school board refused to let her speak at one of its meetings. Before this case was closed for lack of program-specific federal financial assistance, an internal memo regarding the case noted that no federal dollars went into the construction of the administration building in which the school board met.

o Suffolk County Community College, #02862017.

The complainant alleged that the student insurance offered by the college discriminated on the basis of age, by failing to insure students over the age of 28, and on the basis of sex, because it did not treat pregnancy and related disabilities the same as any other temporary disabilities. After concluding that the college was offering the plan, OCR closed the case because the college office which generated the mailing labels for the insurance company and the Dean, who wrote the letter to the students to introduce the plan, were not part of "an organizational unit of the College that receives or benefits" from ED funds.

In addition to the more recent cases described above, a complete list of the original 64 cases closed or put on hold prepared by the Office of Civil Rights itself is included in Attachment 1. An elaboration of just a few of these cases follows:

o Northeastern University 01-84-2020. A Northeastern University student filed a complaint alleging sexual harassment. While Northeastern University receives large amounts of federal funds, OCR decided it could not investigate the complaint because Lake Hall, the building where the alleged discrimination occurred, was not built or renovated with federal funds. If the alleged sexual harassment had occurred in student dorms which were renovated with federal loans, the complaint would have been investigated.

o Centralia College 10-75-4064. Although a Title IX complaint was filed alleging that the college did not provide women athletes with the same funding, number of games and use of facilities that men received, after Grove City, OCR limited its investigation only to athletic scholarships and ignored all of the other problems which had been alleged.

o Gonzaga University 10-80-2016. A female student at Gonzaga University filed a Title IX complaint alleging that the college did not provide women athletes with the same funding, number of games and use of facilities that male student athletes received. Using Grove City as the reason, OCR limited the complaint to unequal allocation of athletic scholarships, settled with the University on that claim, and ignored the other allegations of discrimination.

o County of Plumas, Local Agency Formation Commission and Plumas County Planning Department 09-84-4013. A woman filed a complaint against the County of Plumas Local Agency Formation Commission and Plumas County Planning Department alleging that she was unlawfully fired on the basis of sex and handicap. OCR refused to resolve the complaint on the grounds that it had no jurisdiction since there was no record of any federal money going to the specific office where she was employed.

o University of Alabama 04-79-2098. A women's athletic coach alleged Title IX violations in the areas of coaches' pay, scholarships, recruiting and housing, and dining facilities. OCR limited the complaint to scholarships, found that the University was in compliance in that area, and refused to investigate the other allegations of discrimination.

o Duke University 04-81-2020. A complaint was filed against Duke University which cited a student health insurance program that excluded pregnancy coverage, in violation of Title IX. OCR investigated and found discrimination, but then refused to go forward with the case on the basis of the Grove City decision.

o University of Washington 10-78-0017. A women filed a Title IX complaint against the University of Washington, alleging that the school's athletic program discriminated against her and other women athletes in the provision of resources and opportunities. OCR closed her complaint with respect to all claims except for athletic scholarships, on the basis of the Grove City decision.

o Simmons College 01-84-2005. A woman alleged age and sex discrimination by Simmons College, Boston, Massachusetts when her position with the College's Center for the Study of Children's Literature was terminated. OCR, in closing the case, stated that it did not have the jurisdiction to investigate the complaint.

o University of Maryland 03-77-0308; 03-81-2028. Complaints were filed against the University of Maryland alleging discrimination against women athletes, citing differences in travel and per diem allowances, provision of support services, lack of teams and other deficiencies. After extensive investigation, in February of 1984, OCR found that the University was in violation of Title IX, but refused to go forward on the complaint immediately after the Grove City decision. To this day, the complaint remains unresolved.

* * *

SUMMARY

The foregoing cases demonstrate that enforcement of civil rights statutes has been severely affected by the Grove City decision. OCR has limited investigations of complaints and curtailed compliance reviews, and courts have dismissed or narrowed private suits. This constricting of enforcement means that even if the discrimination is indisputable, in many cases nothing can be done. Discriminatory institutions continue to receive millions of dollars of federal funds with impunity.

Attachment 1

1. Simmons College, Maine (C)
   No. 01-84-2005
   Title IX/ Employment - Center for the Study of Childrens Literature

2. Northeastern Univ. (C)
   No. 01-84-2020
   Title IX/Sexual Harassment

3. Southeastern Mass. Univ. (C)
   No. 01-84-2025
   Title IX/Employment

4. Mass. College of Art (C)
   No. 01-84-2028
   Title IX/Student Services

5. So. Ct. State College (CR)
   No. 01-84-6001
   Title IX/Athletics - Financial Aid

6. Yale Univ. (C)
   No. 01-83-2025
   Section 504/Employment

7. So. Central Comm. CT (C)
   No. 01-84-2010
   Section 504/Employment

8. Univ. Mass. Amherst (C)
   School of Nursing
   No. 01-83-2024
   Title VI/Grading

9. Yale Univ. Center for British Art (C)
No. 01-84-2027
Section 504/Employment

10. N.E. Sch. of Law (C)
No. 01-84-2029
Title VI/Grading

11. Univ. Mass., Boston (C)
No. 01-84-2031
§ 504/Auxiliary Aids
All Education Funded Programs

12. Yale Univ. (C)
No. 01-84-2033
Section 504/Employment

13. Univ. of Vermont (C)
No. 01-84-2009
Age Discrimination

14. Sag Harbor, NJ Sch. Dist. (C)
No. 01-83-1149
Title IX/Employee Compensation:
Coaches Salaries

15. East Greenbush Sch. Dist., NY (C)
No. 02-84-1016
Title IX/Athletics
Program funding and coaches
salaries

16. Carmel Sch. Dist., NY (C)
    No. 02-84-1030
    Title IX/Athletics
    Coaches Salaries, sports schedule
    and accommodation of interest
    and abilities.

17. Addison Central S.D., NY (C)
    No. 02-84-1042
    Title IX/Athletics
    Accommodation of interests and
    abilities.

18. Fashion Institu. of NY (C)
    No. 02-77-0560
    Title IX/Employee Evaluation
    Treatment and Compensation

19. Ramapo Central SD, NY (C)
    No. 02-83-1038
    Section 504/Program Services
    as they relate to handicapped
    parents.

20. Univ. of Maryland (C)
    No. 03-77-0308
    Title IX/Athletics Program
    Finding: violation

21. Univ. of Maryland (C)
    No. 03-81-2028
    Title IX/Athletics Program
    Finding: violation

22. Penn. State, PA (C)
    No. 03-81-2036
    Title IX/Athletics Program
    Denial of Access

23. Univ. of Alabama (C)
    No. 04-79-2098
    Title IX/Athletics Program
    Finding: violation

24. Mississippi College (C)
    No. 04-76-0050
    Title IX/Title VI -
    Employee Eval., Treatment
    and Hiring

25. Auburn Univ. (C)
    No. 04-81-2005
    Title IX/Athletics including
    Athletic scholarships
    Finding: violation

26. Duke Univ. NC (C)
    No. 04-81-2020
    Title IX/Athletics including
    Athletic Scholarships, student health
    insurance, housing, retention, and
    employment.

27. Dekalb Comm. College (C)
    No. 04-77-0042
    Section 504/Employment

28. Univ. of Miami
    No. 04-80-2059
    Title IX/Athletics Program
    Findings: Corrective action plan
    to remedy violation accepted.

29. Vanderbilt Univ. TN (CR)
    No. 04-84-6001
    Title IX/Athletics including
    Athletic scholarships

30. Medical Univ. of S. Carolina (C)
    No. 04-84-2051
    Section 504/Employment

31. Nova University
    No. 04-84-2052
    Title VI/National Origin
    Grading

32. Miami Univ., OH (C)
No. 05-84-2008
Title IX/Athletics including
athletic scholarships
Finding: Distribution of financial
aid was equivalent.

33. Ball State Univ. (C)
No. 05-82-2085
Title IX/Athletics
Finding: Athletic financial aid
awarded disproportionately in
academic year 1981-82. Remedied
in academic year 1982-83

34. Ohio Univ. (C)
No. 05-79-2127
Title IX/Athletics including
athletic scholarships
Finding: Financial aid awarded
proportionately. OCR raised concerns
and compliance plan adopted.

35. Western Michigan Univ. (C)
Title IX/Athletics including
athletic scholarships
Findings: Compliance, however,
concerns raised regarding
selection of sports.

36. Univ. of Minnesota (C)
No. 05-74-0526
No. 05-75-0534
Title IX/Athletics including
athletic scholarships
Findings: Female athletes not
awarded aid proportionately.
University provided assurance that
it would increase assistance over the
next two years.

37. Baylor Univ. (CR)
No. 06-83-4001
Title IX/Athletics including
athletic scholarships

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48. Univ. of Wyoming (CR)
No. 08-84-6001
Title IX/Athletics including
Athletic scholarships

49. Univ. of Colorado (CR)
No. 08-84-6003
Title IX/Athletics

50. South Dakota State Univ. (C)
No. 08-84-2006
Title IX/Athletics including
Athletic scholarships

Case

51. Los Angeles Southwest College (CR)
No. 09-84-6001
Title IX/Athletics

52. Victor Valley CC (CR)
No. 09-84-6004
Title IX/Athletics

53. Hilltop Beauty School, Inc. (C)
No. 09-83-4004
Title IX/Sexual Harassment
Title VI/Differential Treatment

54. Arizona State Department of
Correction (C)
No. 09-83-4003
Section 504/Employment

55. Heald Institute of Technology
No. 09-83-2065
Title VI

56. Univ. of Washington (C)
No. 10-78-0017
Title IX/Athletics including
Athletic scholarships

57. Univ. of Washington (C)
No. 10-83-2018
Title IX/Athletics including
Athletic scholarships

58. Idaho State Univ. ID (C)
No. 10-78-0042
Title IX/Athletics including
Athletic scholarships

59. College of Southern Idaho,ID (C)
No. 10-81-2032
Title IX/Athletics including
Athletic scholarships

60. College of Southern Idaho ID (C)
No. 10-80-2046
Title IX/Athletics including
Athletic scholarships

61. Gonzaga Univ. WA (C)
No. 10-80-2016
Title IX/Athletics including
Athletic scholarships

62. Centralia College WA (C)
No. 10-75-4062
Title IX/Athletics including
Athletic scholarships

63. Centralia College, WA (C)
No. 10-74-4080
Title IX/Athletics including
Athletic scholarships

Ms. **Greenberger**. One of the examples involves intercollegiate athletics; it was a fifth circuit decision issued this summer, called *Bennett* v. *West Texas State University*. It is a lawsuit in which we were involved, the students alleging broad-based sex discrimination in recruitment, in scholarships, in coaching, in facilities, in practice times, in per diem allowances, in travel, in level of competition available to the female intercollegiate athletes.

The entire case was dropped. What the court held was there was no right on the part of these students to pursue their claims of athletic discrimination under title IX—not even their intercollegiate athletic scholarship claims, after the *Grove City* decision.

There is a 504 case, *Foss* v. *City of Chicago,* dealing with a city firefighter. The firefighter claimed he was discriminated against on the basis of his handicap and had been fired from his job illegally under 504. The district court dismissed the claim on the grounds that even though the fire department got Federal funds, they did not go specifically to pay for the particular program within the fire department in which that individual was employed.

There is an age discrimination case involving an individual who was discriminated against on the basis of age, as that person alleged, in a school board meeting. That case was dropped on the grounds that there were not Federal fund traceable to this public meeting.

Through these strained interpretations, individuals have lost their rights under these laws.

There is a title VI case described in this report of an individual student, a black high school student, who filed a complaint against the school district, concerning her school's chapter of the National Honor Society, which she said failed to induct her because of her race. In spite of being ranked fifth in her class and participating in a wide variety of extracurricular activities, she was not among the 16 students invited to join the Society. The case was dropped—not because her claim was invalid, but because there was no Federal funding found.

Those are four examples of many listed in this report, and this report is only the tip of the iceberg, a small number of the examples that could be listed.

In sum, there has been, beyond question, a severe and devastating weakening of civil rights protections in this country because of the *Grove City* decision and because of the way it has been seized upon, especially by this Administration, and interpreted in the most narrow of ways.

And that is why I am here and very happy to be able to testify today, to urge that S. 557 be passed so that all four civil rights laws will be restored to their former strength. Once S. 557 is passed, there will be no need to track these travesties of justice in the future.

The **Chairman**. We will give you another minute or two.

Ms. **Greenberger**. I am at the end of the statement. I have heard a number of charges about this legislation, which I think are grossly inaccurate. And I am very sorry that Senator Hatch is not here so that I can respond to his questions and concerns. Because Senator Hatch said he wanted to go into great detail about what this law covered—I was fully prepared to do that, and brought up here with me these hearings on this version of the bill as introduced in the House last year—which include over 1,000 pages of testimony, going into the detailed types of questions that he asked. I would have been more than happy to review the answers with Senator Hatch now—and I will certainly submit any answers to written questions he may have. I am sorry that he was not here.

The CHAIRMAN. Well, we will request if he has questions for you, we will submit them to you and ask for your response.

[The prepared statement of Ms. Greenberger and responses to questions submitted by Senator Hatch follow:]

STATEMENT

OF

MARCIA D. GREENBERGER
NATIONAL WOMEN'S LAW CENTER

BEFORE THE
UNITED STATES SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

HEARING ON S. 557

ON

MARCH 19, 1987

Mr. Chairmen and members of the Labor and Human Resources Committee, I am Marcia Greenberger, managing attorney of the National Women's Law Center. I am pleased to be here today to urge the quick passage of S. 557. This legislation is needed to assure that we have strong laws prohibiting discrimination on the basis of race, national origin, sex, disability and age. However, because I have worked particularly in the area of sex discrimination, my testimony will be directed toward the Title IX aspects of the bill. Nonetheless, I do want to emphasize the overlapping nature of discrimination, and the similarity of approach of the statutes. All aspects of this bill are of critical importance and are properly addressed together.

In 1972, Rep. Patsy Mink summed up the compelling need for Title IX. Her words are as true today as they were 15 years ago:

> "Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access." 118 Cong. Rec. 5806-5870 (1972)

Since 1972, I have worked on issues of sex equity in education, with a particular emphasis on Title IX, to assure fair treatment of women and girls. I have been co-counsel in a number of the Title IX cases which have been brought in the courts, including Haffer v. Temple University, 688 F.2d 14 (3d Cir. 1982); Bennett v. West Texas State University, 799 F.2d 155 (5th Cir. 1986); WEAL v. Bennett, and Adams v. Bennett, 743 F.2d 42 (D.C. Cir. 1984); American Association of University Women, et al. v. Bennett, C.A. No. 84-1881 (D.C. D.C. 1984); and National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir. 1980). I was co-counsel representing the American Association for University Women (AAUW), et al. as amici curiae in the Grove City College v. Bell case in the Third Circuit Court of Appeals and in the Supreme Court. In fact, the Third Circuit opinion cited to and relied upon the brief filed by AAUW in support of its holding that student aid brought the entire school within the scope of Title IX. I also was co-counsel representing amici curiae in the Supreme Court in Cannon v. University of Chicago, 441 U.S. 667 (1979); North Haven Board of Education v. Bell, 456 U.S. 512 (1982); and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) -- all cases raising Title IX issues.

The Supreme Court's reversal of the Third Circuit's holding in the Grove City College case, and the Supreme Court's acceptance of a narrower interpretation of the scope and coverage of Title IX, seriously impair the law's effectiveness as a tool to end sex discrimination in education. Given the fact that Title IX is the only federal law which protects both students and employees in education, its weakening is particularly serious.

The damage to Title VI, Section 504 and the Age Discrimination Act is devastating as well.

Title IX Has Made Important Headway In Combating Sex Discrimination in Education, But Much Discrimination Remains

Title IX has made a real contribution towards sex equity in education. I remember when I first began to work on these issues I was asked to review the Strong Vocational Interest Blank test, which was in use around the country to assist in counseling students as to future careers. At that time, the girls were given pink sheets asking their interests in a limited set of careers stereotyped as "women's jobs." I remember in particular a question on whether the girl taking the test would want to be wife of the President of the United States. I wondered then how one prepared for that career if the answer was yes! The boys were given blue sheets, where higher paying jobs were suggested. The question they were asked was whether they wanted to be President. With the passage of Title IX, the separate tests were eliminated. Our girls must now be given career options which are as broad and as varied as those presented to our boys.

Title IX has meant many other important things as well. It has opened up scholarships, particularly in the area of athletics, so that young women have a chance to secure a higher education and to develop their athletic ability. It has provided an awareness of the problem of sexual harassment in schools, and a mechanism for dealing with the problem. It has opened the door to many graduate professional programs such as law and medicine to women.

But much remains to be done. For example, we still see enormous disparities between the vocational opportunities given to young men and women. Vocational education enrollment remains highly sex-segregated and sex-stereotyped, mirroring the employment patterns in the workforce.

We see wide gaps in the athletic scholarships given to men and women, and in fact there have been reports of a gap in general student aid going to women and men.[1] We see little progress in employment of women in education in the better paying jobs and higher ranks. Title IX is needed as much as ever, not only to retain the gains we have made, but to secure continued progress that women in this country deserve.

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[1] Moran, Mary, Student Financial Assistance: Next Steps to Improving Education and Economic Opportunity for Women, soon to be available from ERIC Clearinghouse on Higher Education and from the Association for the Study of Higher Education, Washington, D.C.

The Grove City Decision Seriously Narrows Title IX's Effectiveness, Both With Respect to Coverage and Enforcement

Under the Grove City case, the receipt of federal student aid was considered to cover only the college's financial aid program. Therefore, Grove City College is free to discriminate against students in its math or science program, yet so long as the financial aid program is not discriminatory the federal student dollars can flow with impunity to its general fund, supporting all of the college's activities including its math and science departments.

The effects of this severe narrowing are building. Immediately after the decision, the Department of Education (ED) began to close complaints and narrow interpretations, even where discrimination has been found, on the grounds that in its view after the Grove City decision Title IX no longer prohibits the discrimination. By its own count, over 60 cases were so affected in the months after the Grove City decision was issued. The National Women's Law Center's report on the impact of the Grove City decision issued today, lists additional example after example of cases which continue to be closed, not only in Title IX but also Title VI, Section 504 and the Age Discrimination Act. Yet, even these more recent cases are only the top of the iceberg. They are a graphic demonstration of the loss of protection have suffered when Grove City College was decided.

Much more can be said about the damage done. For example, the Department has not initiated reviews of schools' compliance it otherwise would have conducted because of the Grove City College case. We see a number of reviews now which are far more limited in their scope. As a result, the Department's efforts to uncover and remedy problems have been severely affected. And we cannot count the number of cases never even filed because of Grove City. I would like to include the National Women's Law Center report, Federal Funding of Discrimination: The Impact of Grove City College v. Bell, as a part of the record. The volume of cases closed, and the discrimination unremedied, is sobering.

S. 557 Restores the Law to Its Former Strength

S. 557 puts the four civil rights laws back to where they were before Grove City was decided. It does nothing more and nothing less.

It takes a simple and straightforward approach to avoid any good faith charge of lack of clarity. The bill simply defines what is a "program or activity" in the major categories of coverage:

1. A state or local government agency or department is covered in its entirety if federal financial assistance is extended to any part;

2. When the aid goes to the entire state or local government, the entity distributing the funds is covered in its entirety, as well as the agency or department to which the funds are extended;

3. A college, university or public system of higher education, local education agency or school system is covered in its entirety if federal financial assistance is extended to any part; and

4. With respect to corporations, partnerships or sole proprietorships, a plant or facility is covered in its entirety if federal funds are extended to any part. The entire entity is covered if federal funds are extended to the entity as a whole, or if it is principally engaged in education, health care, housing, social services or parks.

This approach of covering the entire institution is clearly consistent with what Congress intended when passing Title IX. When Title IX was pending, Representative Green explained:

> "The purpose of title [IX] is to end discrimination in all institutions of higher education. yes, across the board. . . ." 117 Cong. Rec. 39256 (1971)

And it was only with such across-the-board coverage that Title IX could be the "strong and comprehensive measure" Senator Bayh described and clearly intended the law to be. 118 Cong. Rec. 5804 (1972)

Moreover, by modeling Title IX after Title VI of the 1964 Civil Rights Act, Congress adopted and approved a statutory scheme which had been interpreted to be strong, providing across-the-board coverage. Not only agency regulations and enforcement, but case law decided before Title IX was passed confirmed this broad approach under Section 601 of Title VI. *See e.g. United States v. Jefferson Co. Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied sub nom Caddo Parish Board of Education v. United States*, 389 U.S. 840 (1967); *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert denied*, 388 U.S. 911 (1967); *Board of Public Instruction of Taylor Co. v. Finch*, 414 F.2d 1968 (5h Cir. 1969).

The enforcement sections of Title VI and IX (Sections 602 and 902) were also designed with care. Government agencies providing federal funds are obligated to provide an enforcement scheme which includes fund termination in the event that efforts to conciliate fail, or referral to the Justice Department for a court suit to secure the end of the discrimination. Where fund termination is used, the government is obligated to "pinpoint" the funds terminated. This principle, as originally intended, remains in the bill.

Moreover, since Title IX was passed, Congress has consistently refused to narrow its scope. As was true for Title VI, HEW promulgated regulations tracing the Title VI approach and broadly interpreting the scope of Title IX. See 34 C.F.R. Part 106. The regulations were approved by the President and sent to Congress for review.[3]

Congressman O'Hara held six days of hearings on the Title IX regulations. He described the hearings as designed to determine "whether or not the regulations as they are written are consistent with the law, or whether they should be returned to the agency for redrafting until they are consistent with the law from which they must draw their authority." Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House, Committee on Education and Labor, 94th Cong., 1st Sess. 97 (1975). Proposed concurrent resolutions that would have disapproved the regulations were not approved by either the House or the Senate.

Congress has also consistently refused to approve express efforts to limit the coverage of Title IX to programs and activities directly receiving federal funds. One such effort was an amendment introduced by Senator Helms in 1975. He explained: ["t]he bill provides that Title IX shall apply only to education programs and activities which directly that Title IX shall apply only to education programs and activities which directly receive federal financial assistance * * *.
122 Cong. Rec. 23846 (1975). Senator Helms' bill was not passed.

Given these overwhelming indications of Congress' intent to create a broad-reaching statute, one might well ask how a majority of the Supreme Court decided Grove City as it did. In fact, it is important to keep in mind that this information was never presented to the Court by either party in the case. The two opposing parties were Grove City College and the government. Once the government switched its position in the Supreme Court, neither side supported the view that institution-wide coverage was intended by Title IX. Moreover, the government refused to support a petition to the Court that third parties be given time to present arguments in favor of institution-wide coverage to the Supreme Court. Therefore, the Court decided this most critical of issues without hearing from anyone who supported the original long-standing position of the government.

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[3] Pursuant to the General Education Provisions Act, 20 U.S.C. §1232, Title IX regulations could not become effective until Congress has had 45 days to review the regulations and to reject them. Although the statute was later amended to provide that failure to disapprove regulations did not constitute a finding of consistency with the underlying legislation, see 20 U.S.C. §1232(d), the regulations were finalized before the law was so amended.

The Administration Supported Bill is Not An Adequate Substitute

The Administration has indicated its support of the bill (S. 272) introduced in the last Congress, as the vehicle through which the Grove City case should be overturned. As the architects of the Grove City College decision, and as those who believe the decision is correct, it is ironic to see the Administration officials give their views as to what types of legislation will restore the laws to their pre-Grove City status. And their current views reflect how narrow they still want coverage to be.

That bill only specifically overturns the Grove City case for educational institutions. It does not resolve what coverage would be either outside of education, or outside of educational institutions (such as state education agencies). Mr. Reynolds, Assistant Attorney General for Civil Rights, testified in House hearings last year that he thinks that if the bill passed, all of these other areas would remain "program-specific" as defined by the Grove City case.

Moreover, the term "educational institution" is defined in Title IX currently,for purposes of certain exceptions to coverage in the law. Because it deals with exceptions to coverage, it is defined narrowly and can be as small as a department. If the Administration bill passes, we could find ourselves with a codified version of the Grove City case, covering only certain departments within a school or college.

Moreover, we hear from Administration witnesses that such a narrow result is precisely what they intend. They do not want all of a university covered. They do not want all of a university system covered. They do not even want all of the activities of a college covered under Title IX.

Former Assistant Secretary Singleton, of the Office for Civil Rights (OCR) in the Department of Education, testified before the House that to do so would broaden the law from where it was pre-Grove City. In his view, pre-Grove City, OCR could not attack the problems of a segregated state system of higher education unless federal money could be traced to every campus. In his view, money-raising activities for intercollegiate athletics, even though conducted in a sex-discriminatory way, would not be covered if conducted by the university off campus. In his view, even a campus-based restaurant might not be covered.

His views of past coverage are as skewed now as they were when the government asked the Supreme Court to rule as it did in Grove City. And this narrow coverage is precisely what the Administration bill would perpetuate.

Prompt Action Is Needed

It is important that S.557 move quickly, to clarify that indeed broad coverage and effective enforcement is required. We have seen cases closed and victims of discrimination left with nowhere to turn. Federal dollars are now flowing to institutions which even the Department of Education has found to discriminate. Moreover, the amounts of federal dollars at issue are enormous. When Title IX was promulgated, the House Report listed many categories of federal financial assistance covered by the statute. H.R. Rep. No. 5544, 92nd Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code. Cong. & Admin. News 2462. From Basic Education Opportunity Grants to Guaranteed Students Loans to construction monies to myriad grant and contract programs, the list was long. Now many new funding programs have been added.[3]

That billions of federal dollars could be used to support discrimination is simply unacceptable. The rights of women, minorities, disabled persons and older Americans depend on Congress' speedy action to correct this terrible wrong.

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[3] The District Court in Grove City College held that Guaranteed Student Loans are federal financial aid to schools but are not federal financial assistance subject to government enforcement under Title IX on the grounds that they fit within the statutory exception of contracts of insurance or guaranty. Because the GSL program provides a substantial interest subsidy as well as special allowance payments in addition to the guaranty, all past administrations correctly took the position that the GSL program goes beyond the exemption and is included. However, the Justice Department dropped the appeal on this issue originally taken by the government, so that the Grove City College case ultimately dealt only with Basic Education Opportunity Grants. See Hearings Before the Committee on Education and Labor, Subcommittee on Postsecondary Education, House of Representatives concerning Guaranteed Student Loans on May 13, 1982. In fact, Guaranteed Student Loans are not "contracts of insurance or guaranty" as that phrase is used in Title VI and Title IX.

Answers of Marcia Greenberger To Written Questions of Senator Hatch on S. 557

Question 1

What is your view regarding whether S. 557 will expand the application of the abortion regulations under Title IX. Please explain your view of what is currently required under these regulations.

Answer 1

S. 557 will make no change in the abortion regulations under Title IX. These regulations proscribe discrimination on the basis of "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom." These protections apply only to students and employees. 34 C.F.R. §106.40(b)(1); 34 C.F.R. §106.57(b). And they prohibit a range of activities. For example, recipients may not exclude students from an education program or activity, including any class or extracurricular activity. 34 C.F.R. §106.40(b)(1). Similarly, a recipient must treat disabilities arising from pregnancy or related conditions such as abortion, the same as any other temporary disability for a medical or hospital plan it "administers, operates, offers, or participates in with respect to students" or offers as a fringe benefit to employees.34 C.F.R. §106.40(b)(4); 34 C.F.R. §106.57(c); see also 34 C.F.R. §106.40(b)(5) (student leave); 34 C.F.R. §106.57(d) (employee leave).

Question 2

In your testimony you note that 60 Title IX cases were adversely affected by the Grove City College v. Bell decision. Had S. 272, the Civil Rights Act Amendments introduced by Senator Dole during the 99th Congress, been enacted, how many of these cases would have been closed or narrowed? Please cite any such cases which would have been closed or narrowed.

Answer 2

I noted in my testimony that many more than 60 Title IX cases were adversely affected by the Grove City College v. Bell decision. Some of the cases I listed were provided to me by the Department of Education pursuant to litigation in which I serve as counsel to plaintiffs. I was not provided with sufficient funding information to determine with certainty which cases would have been closed or narrowed had S. 272 been passed. However, I believe a substantial number could remain closed even if S. 272 were passed.

For example, many dropped Title IX cases involved intercollegiate athletics. Former Assistant Secretary for Civil Rights in the Department of Education, Harry Singleton, testified that S. 272 did not cover "noneducational" activities of educational institutions, such as:

> "some aspect of the program that is totally outside the university, it may be a program that the university puts on to attract kids for its athletic program, and it is funded entirely out of receipts from the sale of tickets, something of that sort."

Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 99th Cong., 1st Sess. 309-10 (emphasis added). Given that interpretation of S. 272, a number of intercollegiate athletic complaints concerning recruitment and separate fundraising for men's athletic programs could well remain closed.

Of course, outside of Title IX and education, cases such as Foss v. City of Chicago, a Section 504 case dealing with a firefighter, would be unaffected by S. 272.

Question 3

Has your organization ever taken the position that failure to provide abortion services is a form of sex discrimination? I am speaking as to policy, not the law under current statutes and regulations.

Answer 3

To the best of my knowledge and belief, the National Women's Law Center has never taken the position, as a matter of policy not the law, that failure to provide abortion services is a form of sex discrimination.

Question 4

Consider the example of a clinic that is owned by a university and administers and provides services under that university's school health program. Under S. 557, would that clinic be able to deny access to women?

Answer 4

Assuming the university receives federal financial assistance, the clinic would be required to comply with Title IX with respect to its female students and employees. It therefore could not deny female students and employees any access that it provides to male students and employees.

Question 5

If the clinic mentioned in question (4) were owned and administered by a private hospital, such as the St. Louis Regional hospital cited by Mr. Wilson, but had a contractual arrangement with a nearby teaching hospital such that medical students and residents provide much of the indigent care to the general public in the region, was such a hospital covered by Title IX prior to Grove City College v. Bell? Please cite case law in support of this assertion.

Would St. Louis Regional or a similarly situated hospital be covered under Title IX if S. 557 were enacted?

Answer 5

This question does not provide information as to whether federal financial assistance is received by the teaching hospital or university, but, given the large amounts of federal funds going to both hospitals and universities, I will assume such assistance is received by both institutions. Therefore, the university must comply with Title IX (see question 4) and the hospital must comply with Title IX with respect to its educational programs, regarding employees and students, whether or not it has a relationship with the clinic. Noneducational institutions must comply with Title IX with respect to their educational programs. See, e.g., Canterino v. Wilson, 564 F. Supp. 174 (W.D. Ky. 1982), modified sub nom Canterino v. Barber, 564 F.Supp. 711 (1983). Assuming federal funding is received, this hospital obligation exists whether or not S. 557 is enacted.

Question 6

Under S. 557, would that hospital be forced to provide abortion services to its indigent patients?

Answer 6

No. S. 557 does not address in any way the substantive requirements of Title IX, including the regulations pertaining to abortion. Moreover, those regulations apply only to students and employees, not to indigent patients.

Question 7

In your written testimony, you note that the body of Title IX regulations were examined in six days of hearings in 1975 to determine whether the regulations as they were written are consistent with Title IX. Given this specific action and the failure of Congress at that time to propose or pass resolutions disapproving such regulations, do you believe the regulations mandating abortion coverage in health, medical and leave policies under Title IX, i.e. 34 C.F.R. 106.40(b)(4) and (5) and 34 C.F.R. 106.57(c) and (d), have been ratified by Congress?

Answer 7

The legal significance of Congress' consideration of the Title IX regulations, and failure to disapprove them, was discussed expressly by the Supreme Court in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), in which Title IX employment regulations were upheld. However, Courts have also refused to apply portions of these regulations. See Mabry v. The State Board for Community College and Occupational Education, 813 F.2d 311 (10th Cir. 1987).

Question 8

Would an executive branch action to repeal the Title IX regulations relating to abortion at this time be subject to a legal challenge?

Answer 8

Executive branch retention and enforcement of these regulations, as well as their repeal, are and would be subject to legal challenge.

Question 9

Should inclusion of the language found on page 2, lines 13 through 16, be interpreted as codifying, approving or sanctioning all existing federal regulations, rules, and opinions interpreting the four laws addressed in S. 557?

Answer 9

The language referred to explains the purposes of the legislation -- it is not part of the statute. Moreover, the language refers only to the regulations, rules and opinions dealing with broad coverage of the statutes. It does not refer to any substantive interpretations whatsoever.

Question 10

Does the language on page 2, lines 13-16 of S. 557, codify 34 C.F.R. 106.40(b)(4) and (5) and C.F.R. 106.57(c) and (d)?

Answer 10

No. See answer to question 9. As substantive regulations, they are not referred to by the language in any way.

April 21, 1987

The **Chairman**. I will yield my time to the Senator from Maryland.

Senator **Mikulski**. Thank you, Mr. Chairman, and thank you to the panel for their excellent presentations.

I have a question for Ms. Greenberger. Ms. Greenberger, there has been a lot of confusion in some of this testimony today about what is mandated currently and what would be mandated by this bill. Also, in my own background, I was educated by the Sisters of Notre Dame and the Sisters of Mercy. If this bill were passed today, Senate 557, would I have to call Sister Kathleen Feeley, President of Notre Dame College, and tell her to do anything differently tomorrow than what she currently has to do today?

Ms. **Greenberger**. This law, as has been said, S. 557, is restoring what has existed before—nothing more and nothing less.

Ms. James has said she does not like the current regulations——

Senator **Mikulski**. Let us not go into what Ms. James said. Just think of me, calling Sister Kathleen Feeley the day after this bill is passed; would I have to ask Sister Kathleen Feeley to do anything different in the area of health services or whatever than she is doing today—and she is not discriminating——

Ms. **Greenberger**. Right, assuming that there is no problem, which I hope is the case; then she would not have to do anything differently.

Senator **Mikulski**. Let us take Sister Mary Thomas, the head of Mercy Hospital in Baltimore, a teaching hospital—and by the way, both of these have boards of ecumenical character to them. Would I have to tell Sister Mary Thomas at Mercy Hospital—presuming there is no discrimination now on the books—that she would have to do anything different at Mercy Hospital tomorrow than she is doing right now today?

Ms. **Greenberger**. No, she would not.

Senator **Mikulski**. So there is no problem or confusion in those areas, is that right, so that a lot of these radical changes that are being discussed, forcing institutions for whom I have a great deal of respect and are important to our society, would not have to change anything that they are doing today?

Ms. **Greenberger**. If they are not discriminating—and I am fully prepared to believe that is the case—they would have nothing to change once this law is passed.

Senator **Mikulski**. Particularly in the delivery of health services or medical services.

Ms. **Greenberger**. That is certainly true.

I also wanted to take a minute, because you did mention a lot of confusion, to talk about the Tauke-Sensenbrenner amendment——

Senator **Mikulski**. Well, you had your time.

Ms. **Greenberger**. Oh, OK. Sorry.

Senator **Mikulski**. Now, Ms. James, I have a great deal of respect for your commitment to an ethic of life.

Ms. **James**. Thank you, Senator.

Senator **Mikulski**. Did you say your sister was in the audience?

Ms. **James**. No; but my son is.

Senator **Mikulski**. Oh, I am sorry.

The **Chairman**. Her son is.

Senator MIKULSKI. Oh—well, then, we would like to recognize him.

The CHAIRMAN. Does he want to stand up?

Ms. JAMES. Well, Senator, that is awfully generous of you.

The CHAIRMAN. Well, I have done it for my son today; you ought to be able to do it for yours. [Laughter.]

Senator MIKULSKI. I was going to say that; if Senator Kennedy could have his son sit down, you could have yours stand up.

Senator HUMPHREY. Mr. Chairman, parliamentary inquiry. Would it be possible in that case to have young Mr. James testify, as did your son?

Ms. JAMES. Considering he is seven years old, that would be a bit much. [Laughter.]

Senator MIKULSKI. Ms. James, you talked about the lawsuits that you are concerned about. Under the current regulations, have there been any lawsuits brought by feminists that you are worried about, particularly among those institutions that I know both you and I are quite interested in?

Ms. JAMES. Well, as a matter of fact, what I am concerned about is something that happened in the State of Connecticut, where the State ERA was interpreted to mean that the State would have to provide abortion services. And it is this kind of lawsuit that we are talking about.

Senator MIKULSKI. But excuse me, they brought that suit under the State ERA. They did not bring it under the current title IX, nor the current regulations of title IX; am I correct?

Ms. JAMES. Well, I think that it is important to understand that the principle there was "sex discrimination." And that is our concern about these regulations—that sex discrimination in these regulations is interpreted to mean that we must provide abortion services.

Senator MIKULSKI. But Ms. James, in all due respect, the regulations are on the book now, and therefore would be a target for lawsuits, either for or against the regulations. Have there been enormous and significant——

Ms. JAMES. No, because the hospitals are not covered. And I think it is important to understand that.

Senator MIKULSKI. I am sorry. I thought that one of the concerns that was raised in these regulations is that we currently cover a wide range of these, including termination of pregnancy; that was part of the rather tart exchange that occurred earlier.

Ms. JAMES. That is precisely the point; the hospitals were not covered in that particular time because it was very program-specific. Under the Civil Rights Restoration Act, title IX will cover any hospital that has even one medical student or one nursing student involved.

Senator MIKULSKI. Ms. James, I think we disagree. I think that these regulations that have been referred to—and I regret we do not have copies here—do cover the points that you wanted to make.

Ms. JAMES. I think it is important to understand that, as an example, the New York State Council of Catholic Hospitals calls the Tauke-Sensenbrenner amendment to the bill "absolutely necessary" in order to prevent "a cutoff in Federal aid to Catholic hospitals that refuse to perform abortions."

National Right to Life's legal counsel, James Bopp, who is an authority on abortion law, says that since S. 557 has incorporated into title IX the principle that discrimination on the basis of sex includes failure to provide abortion-related services, the teaching hospital would be required to provide them to the general public. Also, the attorneys for the American United for Life Legal Defense Fund——

Senator **Mikulski**. Well, Ms. James, reclaiming my time, if I may——

Ms. **James**. Well, I think I have the time to respond to your question.

Senator **Mikulski**. But I think you made two points; I think seven examples on the same is not necessary.

Ms. **James**. Well, I think it rests to say that there are many legal experts in our country who would disagree with you, Senator.

Senator **Mikulski**. If I could just come back to a point raised by Senator Metzenbaum, does the National Right to Life group and the groups that you have outlined that are gripped by fear on this legislation, like the Catholic Hospital Association, do they intend to take any action to change the regulations currently on the books?

Ms. **James**. I am glad you asked that, because I really did want to clarify the question that Senator Metzenbaum asked so many times.

I think it is important for all of us to understand that by the time President Reagan came into office, the Congress had already implicitly ratified the body of title IX regulations. That is underscored in Ms. Greenberger's written testimony. We are not in a position to pressure the administration to repeal the regs, because we know that the chance of a repeal withstanding a court challenge is just zilch.

Senator **Mikulski**. Ms. James——

Ms. **James**. I think that it is even laughable to suggest to us that that would be a possible remedy. And we recognize at the National Right to Life that the way to take care of this particular problem is by amending this bill.

Senator **Mikulski**. Well, if this bill does not pass, those regs will still be on the books. Those are the regs; that is the way the law is being interpreted. And I would really——

Ms. **James**. Yes, but those regulations are now very narrowly applied.

Senator **Mikulski** [continuing]. Most respectfully recommend—you have a President who is sympathetic to your cause; you have a Secretary of HHS who has the power to change regulations through an administrative process, and it would not subject him to lawsuits. And, rather than derailing the bill, we would recommend perhaps you would want to change the regulations.

Ms. **James**. Senator, what we——

Senator **Mikulski**. Mr. Chairman, I have no other questions.

Ms. **James**. May I respond to that?

The **Chairman**. Yes.

Ms. **James**. Senator, we are interested in doing something that is really going to make sure that the regulations, as well as title IX itself, are not used to further extend "sex discrimination" to mean that a woman is entitled to an abortion. And we recognize that by offering to us to ask the Administration to simply change the regulations will do absolutely nothing.

I think it is even laughable to suggest administrative action as a possible alternative, when we have something that we can do to make sure that those regulations are changed.

What happens if the Administration changes? Those regulations can be put back in place again.

Senator MIKULSKI. Well, I find the argument that you are presenting to be circuitous. You do not want to change the regs because you say they cannot be changed. Then you say a President could change the regs. And I do not want to get bogged down in that. I am interested in S. 557.

But what I am interested in is also what happens to people after they are born. What happens to the women in this country, what happens particularly to the disabled, those who are born with significant birth defects? It has been a source of great concern to me that we love to parade ourselves around with the March of Dimes poster kids, and then we will not give them jobs, we will not give them opportunities, we will not give them the things that the rest of us have in our society.

Ms. JAMES. Senator, I share that concern with you. We are concerned about children from conception until their natural death, not just until birth.

The CHAIRMAN. The Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

I want to begin with Mr. Wilson, if I may. You qualified your title, and I missed it, at the outset. You are not here as a member of the city council; is that correct?

Mr. WILSON. No; I am the city attorney for St. Louis, Senator.

Senator HUMPHREY. "Counselor", not "Councilor".

Mr. WILSON. Yes, that is right.

Senator HUMPHREY. All right. So you are here in the capacity as the big lawyer for St. Louis, right?

Mr. WILSON. Well, "a lawyer" for St. Louis.

Senator HUMPHREY. You are the head of the—you are the top-ranking attorney for the city of St. Louis?

Mr. WILSON. Yes, that is correct.

Senator HUMPHREY. You are not here to advocate a particular moral or philosophical point of view.

Mr. WILSON. No, that is correct.

Senator HUMPHREY. You are here, as I understand your testimony, to present the case for the city of St. Louis with respect to the effect of this bill were it to become law on the operation of the hospital.

Mr. WILSON. Yes. I think we are here to present a dilemma that we see coming out of the legislation.

Senator HUMPHREY. OK. So, then, you disagree with the earlier testimony that passage of this bill will have no effect on medical providers with respect to abortion.

Mr. WILSON. Yes. I would take exception, I guess, to Ms. Greenberger's answer to Senator Mikulski. Sister Thomas, I would advise her that she has a problem with this bill. If it is a teaching hospital affiliation with a university, I think that university carries with it title IX, which carries with it the regs, which have indicated that termination of pregnancy is a denial or constitutes sex discrimination. It is one of many medical services, all of which have to be provided; that that contract with the hospital, then, and the university links up, so that the hospital then is exposed to liability claims for those people who come in and are denied elective abortions.

Senator **Humphrey**. You disagree, then, with the—well, let me drop that. I was going to get into the Catholic hospital that was the subject of the discussion a moment ago, but I do not know the circumstances there, so I had better leave that alone.

With regard to the St. Louis hospital, you would advise your client, the city of St. Louis, that were this law to pass, it would have to change its policy with respect to elective abortions?

Mr. **Wilson**. Or to cease a university medical school affiliation for the hospital. It would have those alternatives, as I would see it.

Senator **Humphrey**. Right. With respect to the former, you would have to advise the city to override the will of the citizens as you expressed it and to begin to provide elective abortions.

Mr. **Wilson**. Well, it would have to go back to the citizenry with the other alternative and say, here, do you want to change this? You are not going to have your cake and eat it, also.

Senator **Humphrey**. Well, in any event, Mr. Chairman, here is a real world, practical, down-to-earth, heartland America example of the dilemma this bill would create if enacted as it stands. I think that is very important testimony inasmuch as Mr. Wilson is simply here in his capacity as counselor of the city of St. Louis and is not here to represent a particular political, philosophical or moral point of view.

Now, focusing on the other element, apart from the will of the citizens, who apparently by some means expressed their wish not to provide elective abortions, apart from that, focusing on the relationship with the hospital owned by Washington University, you employ medical personnel in your own hospital who are also employees of Washington University Hospital?

Mr. **Wilson**. Yes. The university staffs our Regional Hospital.

Senator **Humphrey**. Yes. And because some of the staff or students of Washington University Hospital receive Federal funds, who at the same time work for the—what is the name of the hospital in St. Louis——

Mr. **Wilson**. Regional Hospital.

Senator **Humphrey** [continuing]. Who at the same time work for Regional Hospital, in your opinion therefore, the connection is made, and the city of St. Louis is placed in a dilemma.

Mr. **Wilson**. Yes. I do not think it is just the students. As I would understand it, the medical school receives title IX funds directly itself.

Senator **Humphrey**. Well, I guess I have a few minutes left. I know that Senator Weicker is anxious, and indeed I have to go to markup.

Senator **Weicker**. No. I have no questions at all.

Senator **Humphrey**. He is not anxious.

Senator **Weicker**. Not on this subject.

Senator **Humphrey**. All right. I am anxious. I have to go to a markup before somebody "steals the store" in another place.

Ms. **James**. Senator, may I make a point while we still have the floor?

Senator **Humphrey**. Yes.

Ms. **James**. I would just like to make the point that prior to *Grove City*, off-campus hospitals that had no relationship to the university except a medical teaching program were not covered by title IX or by——

Ms. **Greenberger**. I think that is not correct, Ms. James.

Ms. **James** [continuing]. Excuse me, may I finish——

Senator **Humphrey**. No fighting between the witnesses.

Ms. **Greenberger**. I just wanted you to know that I think that is wrong.

Ms. **James**. I would just like to finish.

Senator **Humphrey**. May we hear Ms. James, please.

Ms. **James**. We have had no record that anybody even suggested that such a teaching hospital was covered prior to 1984. Maybe in someone's mind, they ought to have been covered, but in the real world out there, these hospitals were not covered. And I think that the proponents of the Restoration Act even concede that under the bill any hospital with interns, residents or nursing students will be regarded as an arm of or operation of the federally funded university medical school and therefore will be reached by title IX.

And again, those campus hospitals were not covered prior to *Grove City*. It looks like this is not just simply a restoration act.

Ms. **Greenberger**. Since Ms. James wanted to catch you, Senator Humphrey, before you left, I did want to try to catch you, also.

Senator **Humphrey**. You may have my time—go ahead—to show you what a great guy I am.

Ms. **Greenberger**. And again, I think perhaps it might be useful, because we do not have very much time, to submit this in more detail in the written record.

My understanding of the state of the current law in Mr. Wilson's city and State is that it may not be quite as firm as the written testimony reflects. I have only had a chance to look at Mr. Wilson's testimony quite briefly, but I know for example there was an 8th Circuit decision, *Nyberg* v. *City of Virginia*, that does place certain requirements on hospitals currently, and that there was a recent District Court decision just a few days ago with respect to the State law that is the subject of his testimony, saying it was unconstitutional.

To the extent that the will of the people that he is trying to reflect has led to unconstitutional statutes, they can not be the kind of statute that should stand in the way of the Civil Rights Restoration Act.

Mr. **Wilson**. Well, if I may, I do not know if we should launch into legal debate here or not, but I can assure you the case of *Doe* v. *Poelker* and the two companion decisions that came out of the State of Connecticut and Pennsylvania, their holdings are still the law of the land, and they are only for the narrow proposition that a locality has the option not to supply public funding for elective abortions.

There was a State statute that Missouri had that I think yesterday was by district court, a lower court, declared unconstitutional in part. That statute had absolutely nothing to do with the principle of public funding by a city or other local government entity.

Senator HUMPHREY. Thank you, Mr. Chairman.

The CHAIRMAN. We will have some additional requests for information which will be made a part of the record.

Ms. JAMES. Thank you, Mr. Chairman.

Mr. WILSON. Senator, if I may, we have a letter that was addressed to you by our executive director of our hospital, and I would ask if that could be submitted as part of the record.

The CHAIRMAN. It will be made a part of the record.

[The letter referred to follows:]

St. Louis Regional
Medical Center

5535 Delmar Boulevard
St. Louis, Missouri 63112
Telephone (314) 361-1212

Robert B. Johnson
Chief Executive Officer

March 17, 1987

The Honorable Edward M. Kennedy
Chairman, U.S. Senate
Committee on Labor and Human Resources
430 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I am writing to you to express my concern about the possible impact of S. 557, "The Civil Rights Restoration Act of 1987" on St. Louis Regional Medical Center, specifically the provision that would classify prohibition against performing abortions in hospitals that receive federal funds for educational purposes as sex discrimination. St. Louis Regional Medical Center is a 300 bed private not for profit hospital, that was established in June 1985 to replace St. Louis City Hospital and St. Louis County Hospital. Through a contract with the City of St. Louis and St. Louis County, we provide care to medically indigent residents. Over fifty percent of our operating revenues come directly from local government.

The contracts we have with the City of St. Louis and St. Louis County specifically prohibit us from performing or providing, either directly or by contract, induced abortions or abortion referral services; except when necessary to save the life of the mother.

We currently secure our physician services through contracts with Washington University and St. Luke's Hospitals for interns, residents and attending physicians. We could not provide care to the large medically indigent population we serve without the post graduate medical education programs we operate.

It is my understanding that the Tauke/Sensenbrenner Amendment, H.R.700/S.431 would restore Title IX to its original abortion-neutral condition. I would strongly urge your support of this amendment so that we are not placed in a position of either violating the law or the contract we have. Either violation would render us financially insolvent, therefore unable to meet the health care needs of a large indigent population.

Thanks very much for your consideration.

Sincerely,

Robert B. Johnson
Chief Executive Officer

RBJ/gv

cc: Senator John Danforth
Senator Christopher Bond

The CHAIRMAN. We will ask if David Tatel, from Hogan and Hartson, former Director of the Office for Civil Rights, Department of HEW, would come forward, along with Chuck Fields, representing the American Farm Bureau, will come forward as our final panel.

Mr. Tatel, we will recognize you.

STATEMENTS OF DAVID S. TATEL, ATTORNEY, HOGAN AND HARTSON, WASHINGTON, DC, AND FORMER DIRECTOR, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; AND CHUCK FIELDS, ASSISTANT DIRECTOR, NATIONAL AFFAIRS DIVISION, AMERICAN FARM BUREAU FEDERATION, WASHINGTON, DC

Mr. TATEL. Thank you, Mr Chairman.

My name is David Tatel. I served as Director of HEW's Office for Civil Rights from 1977 to 1979, during which time OCR was responsible for enforcing title VI, title IX, section 504, and the Age Discrimination Act.

Mr. Chairman, I have a written statement which I have submitted for the record. I will just take two or three minutes and summarize, if I could, my reasons for supporting the enactment of S. 557, the Civil Rights Restoration Act of 1987.

The first and most important reason for enacting S. 557 is that it is needed to restore the jurisdiction of title IX, title VI, and the other Civil Rights Acts to what it was before the Supreme Court's decision in *Grove City* v. *Bell.*

In my written statement, I have tried to explain how the Office for Civil Rights would have approached a civil rights investigation of Grove City College itself prior to the Supreme Court's decision. I have also tried to explain in the written statement how the *Grove City* decision would have affected that jurisdiction and how the Supreme Court's decision would result in immunizing civil rights violations at the college.

I have also explained in my testimony that while restoring civil rights jurisdiction to what it was prior to *Grove City*, S. 557 would not broaden that jurisdiction beyond what it was prior to the Supreme Court's decision.

In short, if S. 557 is enacted, title VI, title IX and section 504 jurisdiction will be neither broader nor narrower than it was prior to the *Grove City* decision.

The second reason for enacting S. 557 is that it is needed to restore the usefulness of the administrative process which Congress created when it passed title VI, title IX and section 504. In fact, it was one of Congress' primary purposes in passing those statutes, to create an administrative alternative to the Federal courts, an alternative which would provide a smooth, efficient and inexpensive technique for enforcing the civil rights laws.

The *Grove City* decision threatens the usefulness of that administrative process in several respects. For one thing, it threatens to convert the process into what will be an administrative nightmare for everyone concerned. After *Grove City*, virtually every civil rights investigation will require accountants to trace the flow of

Federal funds and lawyers to decide what is and what is not a "program or activity".

The result will be cumbersome, burdensome and expensive for everyone concerned.

In addition, by sharply narrowing title IX as the *Grove City* decision did, it will force people protected by title IX and by title VI and the other civil rights acts to abandon the administrative process altogether. This will be completely contrary to what Congress intended when it enacted these statutes, because it will force people back into the Federal courts, which are more expensive, more time-consuming, and less flexible than the administrative process.

Finally, there is absolutely no reason unless, of course, one's purpose is to immunize civil rights violations from Federal scrutiny, there is absolutely no reason to limit these statutes as the Supreme Court has done. After all, these statutes are not criminal statutes; they are not onerous or burdensome statutes which should be interpreted as narrowly as possible.

To the contrary, these are the kinds of statutes which should be interpreted as expansively as possible because they reflect one of our Nation's most fundamental principles, and that is that institutions which are entrusted with the expenditures of public funds ought not discriminate. *Grove City* permits them to discriminate, and for that reason, it ought to be overturned.

It is important to remember, Mr. Chairman, that these civil rights statutes—title IX, title VI, and section 504—have been responsible for bringing about fundamental changes of enormous importance. It is equally important to remember, however, that the job is not yet done, and that these statutes have an important and critical role to play in our Nation's continued fight against discrimination. The *Grove City* decision severely limits the effectiveness of those statutes, and for that reason it ought to be overturned through the enactment of S. 557.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Tatel follows:]

STATEMENT OF DAVID S. TATEL

Mr. Chairman and Members of the Committee, my name is David S. Tatel. I served as Director of the Office for Civil Rights (OCR) in the U.S. Department of Health, Education and Welfare from 1977 to 1979. At that time, the Office for Civil Rights was responsible for enforcing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Those functions are now carried out by the Department of Health and Human Services and the Department of Education.

I appreciate this opportunity to appear here to share my views on S. 557, the Civil Rights Restoration Act of 1987. I support the enactment of S. 557 because it will restore jurisdiction under Title VI, Title IX, Section 504 and the Age Discrimination Act to what it was prior to the Supreme Court's decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984).

HEW's enforcement procedures regarding these important civil rights statutes evolved in connection with Title VI of the Civil Rights Act of 1964, the first of these statutes to be enacted by Congress. The Department interpreted Section 601 of the statute broadly to prohibit discrimination on the basis of race and national origin throughout any institution which received federal financial assistance. This broad interpretation was grounded on the language of the statute, its legislative history, and the well-accepted constitutional principle that all levels of government must steer clear of providing public revenues to institutions which discriminate on the basis of race or national origin. As a consequence, the statute was interpreted as permitting investigations of discrimination on the basis of race or national origin throughout the institution so long as any "program or activity" within it received federal financial assistance.

If an investigation revealed a violation of Section 601, OCR would negotiate with the recipient in an effort to obtain voluntary compliance. If those efforts failed -- and they rarely did -- OCR would impose one of the two sanctions set forth in Section 602. Either OCR would refer the case to the Department of Justice, which was authorized to file suit to require compliance with the broad prohibitions set forth in Section 601, or OCR would initiate an administrative proceeding to terminate federal financial assistance. The fund termination remedy, however, is not as broad as Section 601. Funds can be cut off only if discrimination occurred in the federally funded "program or activity" or if the federal funds benefited a nonfederally funded "program or activity" where discrimination occurred. Funds could also be cut off if a federally funded "program or activity" was "infected" by proven discrimination elsewhere in the institution.

Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1978, and the Age Discrimination Act of 1975 were based on Title VI and contain virtually identical language. As a consequence, HEW applied Title VI enforcement procedures and standards to these newer statutes. They were thus interpreted to prohibit discrimination on the basis of sex, handicap or age anywhere in a covered institution having a "program or activity" receiving federal financial assistance.

Prior to the Grove City decision, the Department would have applied these standards to Grove City College as follows: If the Department had received a complaint about the institution or elected on its own to conduct a compliance review, it would have determined whether sex discrimination existed anywhere in the institution even though the only federal assistance the school received was student financial aid. If sex discrimination was discovered in the school's computer sciences program, for example, the Department would have notified the institution that it was in violation of Title IX. If the matter could not be resolved voluntarily, the Department would have referred the case to the Department of Justice, or initiated fund termination proceedings in order to prove that discrimination had occurred in the computer sciences program and that the program benefited from student aid, or if it did not, that the discrimination infected the federally financed student aid program.

The Supreme Court's Grove City decision dramatically alters these practices. Grove City now prohibits the Department from challenging any gender-based discrimination at the College except that which occurs in the student aid program. Since Title VI, Section 504, and the Age Discrimination Act contain language virtually identical to Title IX, the Department could likewise be prohibited from challenging discrimination based on race, national origin, handicap or age unless it could establish that the discrimination occurred in the particular federally funded "program or activity." If no such discrimination is found, the Department could be precluded from proceeding further even though discrimination might be rampant throughout the rest of the institution. S. 557 is necessary to restore the pre-Grove City interpretation of these important civil rights statutes.

The opponents of S. 557 argue that it would expand the coverage of Title IX and the other civil rights statutes beyond what it was prior to the Grove City decision. An examination of S. 557, however, demonstrates there is no basis for their concern with regard to health, education and social services programs. To the contrary, S. 557 accurately reflects the enforcement practices which prevailed at HEW prior to Grove City. To be specific, S. 557 defines a "program or activity" as, for example, all of the operations of "(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other entity) to which the assistance is extended, in the case of assistance to a State or local government." This is precisely how Title IX and the other civil rights acts were interpreted by HEW prior to Grove City. A grant to a state department of education, for example, would subject that department and its recipients to federal civil rights jurisdiction. Likewise, a federal education grant to a governor's office would subject the office of the governor as well as the state education department to which the governor's office redistributed the federal funds to federal civil rights jurisdiction.

S. 557 also defines a "program or activity" as "(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency . . . or other school system." This definition likewise accurately reflects HEW's enforcement practices and regulations prior to Grove City. A grant to a university or a school system, no matter how limited the purposes of the grant, would have subjected the entire university or school system to federal civil rights jurisdiction. The grant could not, of course, have been terminated by HEW unless the Department determined that discrimination existed in the particular program receiving federal financial assistance or that the federal grant supported discrimination elsewhere in the institution.

As best I can recall, the civil rights statutes were applied to a "system of higher education" in only one circumstance, namely, with regard to HEW's investigation of formally segregated state systems of higher education. Under the Nixon, Ford and Carter administrations, HEW investigated all colleges and universities -- including community colleges -- within those systems without ever checking to determine whether each and every one of them received federal financial assistance. In fact, all colleges and universities in those systems probably did receive some type of federal financial assistance, at least in the form of student aid. Had HEW discovered, however, that one or more postsecondary institutions received no federal aid, that fact would not have affected the system-wide nature of HEW's investigation. The reason for that is simple: HEW could not have investigated system-wide allegations of discrimination if institutions within the system which did not receive federal aid were excluded. Any other result would have defeated one of the very purposes of Title VI, namely, the elimination of racial segregation in colleges and universities receiving federal financial assistance.

This "system-wide" approach to the Title VI investigations would not, of course, have been applied by HEW at the enforcement stage. Had any of those cases progressed to the enforcement stage, the Department would have terminated only those funds that supported discriminatory activities.

S. 557's treatment of private corporations and partnerships is equally reflective of pre-Grove City practices. For example, HEW conducted institution-wide compliance reviews of hospitals even though the federal assistance they received might have been limited to a particular clinic or program. The question of whether the compliance review would have extended to completely unrelated, nonmedical activities of the hospital or to other, nonfederally funded hospitals owned by the same hospital chain never, to my knowledge, arose. Had the question come up, however, HEW's institution-wide approach to civil rights investigations would have resulted in those activities and entities being investigated as well.

It is clear that S. 557 does not extend civil rights jurisdiction beyond the range of authority exercised by HEW before the Grove City decision. To the contrary, S. 557 will restore civil rights jurisdiction to what it was prior to Grove City. Equally important, S. 557 will preserve the pinpoint provisions of all four statutes. In sum, if S. 557 is enacted into law, the administrative application of the statutes will be neither broader nor narrower than it was prior to Grove City.

This does not mean that S. 557 will never be misinterpreted by federal agencies. Indeed, the strategy of its opponents has been to demonstrate how its language could be distorted and extended beyond its intent. This is, of course, a risk that Congress takes when it passes any legislation, for the English language is not unerringly precise. The proper course of action, in this as in all other legislation considered by this Congress, is not to narrow the statute to the point where there could be no conceivable mistakes in the future, but rather to enact a law which sets forth basic principles as clearly as possible and then rely on administrative decision making, which is reviewable by the courts, to ensure that the basic principle is properly implemented. This is precisely what S. 557 does. Its basic principle is the restoration of pre-Grove City civil rights jurisdiction. What is important is that S. 557 will provide clear guidance to government agencies and recipients of federal funds alike, and that it is sufficiently clear to ensure that agency misapplications can be corrected by the courts, or, if necessary, by the Congress.

In addition to restoring the previous interpretation of Title VI, Title IX, Section 504 and the Age Discrimination Act, S. 557 should be enacted to correct other problems caused by the Grove City decision. First, the Grove City decision creates a bureaucratic nightmare for the government and recipients of federal funds alike. Every civil rights investigation will require teams of accountants to trace the flow of federal funds and armies of lawyers to argue endlessly about what is or what is not a "program or activity." It will make the enforcement process cumbersome and expensive to all concerned, and will divert our attention away from the primary concern of both the government and the recipient, namely, elimination of discrimination on the basis of race, national origin, sex, handicap and age.

Second, the Grove City decision totally ignores the fact that receipt of federal financial assistance for one "program or activity" may well free-up nonfederal funds to be used in other programs or activities in the same institution. There is absolutely no reason why a person who is discriminated against in the latter program -- that is, the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution -- should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance.

Third, by sharply narrowing Title IX, the Grove City decision may cause many people protected by Title IX and the other civil rights statutes to abandon the administrative process altogether. This would mean either that some civil rights violations would go unremedied or that many more cases would be forced into the courts which are more cumbersome, more expensive and less flexible than the administrative process. This result would be contrary to one of Congress' objectives when it enacted these statutes: the creation of a smooth and efficient process for remedying civil rights violations.

Finally, and perhaps most important, the Grove City decision is directly contrary to the very purpose of these important civil rights statutes. It makes absolutely no sense to narrow these statutes as the Court has done. They do not, after all, impose onerous or burdensome requirements which should be restricted as much as possible. Rather, they reflect one of our nation's most fundamental principles, namely, that institutions which benefit from public funds ought not discriminate on the basis of race, national origin, sex, handicap or age. The Grove City decision permits them to do so, and for that reason it should be overturned by the enactment of S. 557.

It is important to remember that Title VI, Title IX and Section 504 have been responsible for bringing about fundamental changes of enormous importance. Schools have been desegregated; non- and limited-English speaking students are gaining equal educational opportunities previously denied to them for many years; women and girls are making real progress towards achieving equal educational opportunities; and hundreds of thousands of handicapped people are being brought into the mainstream of American life. But the job is not yet done, and Title VI, Title IX, Section 504 and the Age Discrimination Act have a critical role to play in the future. The Grove City decision limits the effectiveness of these statutes and should be overturned through the enactment of S. 557.

Thank you very much.

The **Chairman**. Mr. Fields, I know that Senator Thurmond very much wanted to be here; he is attempting to get out of some other meeting to welcome you, but I know he would want me to extend a warm word of welcome to you.

Mr. **Fields**. Thank you, Senator.

I will be able to make my points in about three or four minutes.

The **Chairman**. Fine. That will be even more welcome.

Mr. **Fields**. Let me say first, Senator, that the Farm Bureau is not opposed to a bill that simply provides coverage under the civil rights statutes the same as it was before the *Grove City College* decision. But our analysis of this bill leads us to the conclusion that it would go much further than that.

We believe it would result in a broad expansion of coverage under the civil rights statutes including farmers, who were never covered before.

Some 750,000 farmers and ranchers are employers. Any statute or regulation affecting employment practices could have an impact on agricultural employers with regard to sex, age or handicapped requirements.

Several thousand farmers throughout the country operate roadside markets and others, direct markets to consumers. The Department of Agriculture administers a number of programs involving Federal payments or other assistance to farmers and ranchers. The broad and sometimes vague language of this bill raises serious questions in our minds as to what impact antidiscrimination regulations would have on such benefits as loan guarantees, commodity loans, deficiency payments, disaster payments, price supports, conservation cost-sharing, and so forth.

Let me say that the Nation's family farms are already struggling for their very existence in this country and are overburdened already with a myriad of Federal regulations affecting employment on farms and many other phases of their operations.

They should not be threatened with coverage by additional statutory and regulatory requirements in the area of discrimination and civil rights, particularly when such coverage was never intended by the original sponsors of these statutes, and when we know of no need for such coverage.

Thank you, Senator.

[The prepared statement of Mr. Fields follows:]

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE SENATE LABOR COMMITTEE REGARDING S.557 - "CIVIL RIGHTS RESTORATION ACT OF 1987"

March 19, 1987

Presented by C. H. Fields, Assistant Director
National Affairs Division

The American Farm Bureau Federation is the nation's largest farm organization with a current voluntary membership in excess of 3.5 million member families who have paid annual dues to nearly 2,800 county Farm Bureaus in 49 states and Puerto Rico.

Last January, the voting delegates of the member State Farm Bureaus reaffirmed a policy opposed to any legislation that would expand the scope of the existing civil rights statutes to cover those who have not been previously subject to them. The nation's family farms are already struggling for their continued existence as economic entities, and are overburdened with a myriad of federal regulations affecting employment on farms and many other phases of their operations. They should not be threatened with coverage by additional statutory and regulatory requirements in the area of discrimination and civil rights, particularly when such coverage was never intended by the original sponsors of the original statutes and when there is no need for such coverage.

No group of people in this country has a stronger belief in the fundamental principles of freedom, liberty and justice embodied in our nation's basic charter than this nation's farmers and ranchers. We have long believed that unnecessary and unwarranted expansion of the power and responsibility of the federal government constitutes a serious threat to the fundamental principles upon which this nation was founded and prospered among the nations of the world.

We are mindful of the fact that some 750,000 farmers and ranchers are employers. Any statute or regulation affecting employment practices could have an impact on agricultural employers with regard to sex, age or handicap requirements. Several thousand farmers throughout the country operate roadside markets and other direct markets to consumers. The Department of Agriculture administers a number of programs involving federal payments or other assistance to farmers and ranchers. The broad and sometimes vague language in this bill raises serious questions as to what impact anti-discrimination regulations would have on such benefits as loan guarantees, commodity loans, deficiency payments, disaster payments, price supports, conservation cost-sharing, etc.

Supporters of the bill state that Section 7 provides a "rule of construction" which, in effect, exempts farmers as ultimate beneficiaries of federal aid.

We find that statement unpersuasive because:

1. There is no indication in the bill as to which persons or entities are defined as ultimate beneficiaries and under which aid programs. We are not sure it includes businesses, such as farms and ranches.

2. Farms appear to be clearly covered by subparagraph (3) of each operative section because farms are business entities or private organizations, or both under this bill.

3. Even if Section 7 is constructed to exclude coverage of farmers as ultimate beneficiaries before enactment of S. 557, any farm-aid programs adopted after enactment of S. 557 would not be excluded from coverage.

It might also be eroneously argued that Section 4(c) exempts farmers from coverage under the Act. We point out, however, that this language applies only to discrimination against handicapped persons under Section 504 and does not reduce compliance burdens under Title VI or age discrimination. Even under Section 504, only some farmers will benefit from this exemption. USDA Section 504 regulations define "small providers" as entities "with fewer than 15 employees." Somewhere between 50,000 and 100,000 farms employ more than 14 persons. Further, even the "small providers" are exempted only from the most onerous of Section 504 regulatory burdens, such as making structural alterations to existing facilities--and only "if alternative means. . .are available."

The small operations would still be subject to many onerous requirements, including paperwork requirements, requirements to consult with disabled groups and make a record of such consultations; extensive employment regulations; and a requirement to "take appropriate steps" to guarantee that communications with hearing and vision-impaired applicants, employees, and customers can be understood.

To the extent that S. 557 extends the basic principle that the term "program or activity" means all of the operations of the "entire corporation, partnership, private organization, or sole proprietorship," farms may well fall within the scope of that definition in several ways. For example, a subsidy to one commodity on a farm would subject the entire entity to regulation. A farm of contiguous fields could be deemed a "geographically separate facility," and thus covered in its entirety. Additionally, farming could be construed as providing a "social service" to consumers.

Farm Bureau is not opposed to a bill that simply provides coverage under the Civil Rights statutes the same as it was before the Grove City College decision; but our analysis of this bill leads us to the conclusion that it seeks to go much further than that. We believe it would result in a broad expansion of coverage under the Civil Rights statutes, including farmers who were never covered before.

For that reason we are opposed to S. 557 as introduced. We favor, instead, a bill such as the one introduced by Senators Dole and Hatch in the last Congress and which we understood will be introduced in both Houses of this Congress. We hope this Committee will give careful consideration to the concerns we have expressed.

We appreciate the opportunity to present our views.

The CHAIRMAN. Thank you.

I had hoped we would have a chance to look at section 7, which provides limitation on ultimate beneficiaries, which has been interpreted by all of the sponsors as not reaching any of the family farmers that you are most concerned about.

We would be glad to work with you on this specific issue. That has to be adjusted to make it more clear. So we would hope you would work with the Committee, because it is not our intention, obviously to——

Mr. FIELDS. Yes. I think if you had some clarification of what is the ultimate beneficiary.

The CHAIRMAN. We would welcome your involvement.

The Senator from Maryland.

Senator MIKULSKI. Thank you, Mr. Chairman. I know that the time is running late. I just have a few questions for Mr. Tatel, and I thank Mr. Fields for his excellent presentation.

Mr. Tatel, I do not wish to embarrass you, but I note that you have a visual handicap; am I correct in that?

Mr. TATEL. Yes, I do.

Senator MIKULSKI. And could you tell me your educational background and what you have achieved?

Mr. TATEL. Well, after attending high school, I went to the University of Michigan, graduated in 1963; then attended the University of Chicago Law School and graduated there in 1966. I have worked since then in a number of positions, including the one I held at HEW from 1977 to 1979.

Senator MIKULSKI. Well, you are to be certainly complimented for a heroic achievement before the original civil rights legislation was on the books.

Could you just in a very crisp and cameo way outline for the committee that if we do not do S. 557, if you had a nephew in a similar situation, what type of discrimination could he face or would be allowed? Do you think he would have the same opportunities as, say, your older nephew in school prior to *Grove City*?

Mr. TATEL. Senator, the problem with the *Grove City* decision and the one I tried to describe in my testimony is that by narrowly limiting the jurisdiction of the Federal agencies to investigate complaints, or even to undertake their own compliance reviews, very substantial portions of institutions which receive Federal funds—colleges, universities, school systems, et cetera—would be beyond the jurisdiction of these agencies. And that means that for students in elementary or secondary schools or in colleges or graduate schools, for disabled students or minority students or women, major portions of those institutions will be beyond the reach of the Federal agencies that, at least until the *Grove City* decision, had the jurisdiction to protect them.

Senator MIKULSKI [presiding]. Well, we thank you for that description, and I think it outlines the enormous obstacles that it would place in people's behalf to get individual, case-by-case redress. And also without that ability to enforce individual, case-by-case redress or even have a bona fide complaint process, it essentially encourages the institutions themselves to be rather lax in their implementation of the current legislative framework—am I right?

Mr. **Tatel**. Yes. Let me in fact just add one point about these civil rights statutes. They depend very, very heavily on voluntary compliance. In fact during the 2½ years I was at the Office for Civil Rights, 97, 98, maybe 99 percent of the complaints were resolved through voluntary means, that is, without ever having to proceed to the fund termination process or to referring a case to the Justice Department.

Under *Grove* City, it is no longer possible to even reach those complaints in order to determine whether the institutions are willing to solve the problem voluntarily, because right from the outset, they are beyond the jurisdiction of the agency.

So this very effective administrative procedure which, as I said, depends on voluntary compliance and which has worked so successfully, is now unavailable because the agencies will first have to find precisely where the Federal funds are in the institution before they proceed; and if the Federal funds are not received by a portion of the institution where the complaint has arisen, it will be beyond the jurisdiction of the agency.

So thousands and thousands of students and other people will be left without the protection of these statutes.

Senator **Mikulski**. Well, thank you very much, Mr. Tatel. The bells and flashing and so on alerts the committee that we are now moving to a live quorum, for which further legislation will be coming up.

Mr. **Fields**. May I add one further word?

Senator **Mikulski**. Yes, one word.

Mr. **Fields**. I suggest in light of all the farm surpluses we have in this country, we all go forth now and consume.

Senator **Mikulski**. Mr. Tatel, thank you very much for your testimony.

Mr. **Tatel**. Thank you.

Senator **Mikulski**. Mr. Fields, there are some of us who would have to take your advice a little bit less seriously than others. [Laughter.]

[Additional material supplied for the need follows:]

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

STATEMENT BY SECRETARY OF EDUCATION
WILLIAM J. BENNETT
MARCH 31, 1987

The Supreme Court's 1984 *Grove City* decision held that an entire educational institution was not subject to civil rights laws when only one program at the institution received Federal aid.

The *Grove City* decision makes it more difficult for the Department of Education to enforce the civil rights laws.

Today I urge the Congress to act favorably on the bill being introduced by Congressmen F. James Sensenbrenner, Jr. (R-Wis.) and Charles Stenholm (D-Tex.) so that we can remove this jurisdictional impediment in the field of education. There is no need for Congress to get bogged down in making new law that would extend the Department's enforcement far beyond the field of education. What we do need is a return to pre-*Grove City* enforcement practices.

Before the *Grove City* decision, the Office for Civil Rights (OCR) investigated all of the educational programs of an institution if any part of the institution received Federal aid, even when a complaint was filed about an activity that did not itself receive Federal aid.

-MORE-

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The Office for Civil Rights reports that it has closed or narrowed 834 complaints and compliance reviews -- out of over 7,500 received or initiated in the last three fiscal years -- due to the Grove City decision: 674 complaints were closed in whole or in part for lack of jurisdiction due to the Grove City decision; 160 compliance reviews were discontinued or limited.

Of the complaints that were closed, 468 were from a single individual who, during Fiscal Years 1985 and 1986, filed 688 complaints. Leaving aside this single complainant's closures, OCR closed -- for lack of jurisdiction due to Grove City -- 206 complaints out of 6,111 received in the last three years. These cases would not have been closed for lack of jurisdiction due to Grove City had the Administration's legislation in this area been enacted in 1984.

I urge Congress to help us enforce the civil rights laws more effectively by acting swiftly to pass this important piece of legislation, so that no more cases need be closed due to Grove City.

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New language is indicated by brackets.

A BILL

To clarify the meaning of the phrase "program or activity" as applied to educational institutions that are extended Federal financial assistance, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Amendments Act of 1987".

Sec. 2. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end thereof the following new section:

"Sec. 908. (a) Notwithstanding the decisions of the Supreme Court in Grove City College et al. v. Bell, Secretary of Education, et al. and in North Haven Board of Education et al. v. Bell, Secretary of Education, et al., the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.

["(c) This section shall not apply to an educational institution which is controlled by or which is closely identified with the tenets of a particular religious organization if the application of this section would not be consistent with the religious tenets of such organization.]

["(d) Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion.".]

(b) Section 504 of the Rehabilitation Act of 1973 is amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b)(1) Notwithstanding the decisions of the Supreme Court in *Grove City College et al. v. Bell, Secretary of Education, et al.* and in *North Haven Board of Education et al. v. Bell, Secretary of Education, et al.*, the phrase 'program or activity' as used in this section shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(2) In any other application of the provisions of this section, nothing in paragraph (1) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in *Grove City* and *North Haven*.".

(c) The Age Discrimination Act of 1975 is amended by adding at the end thereof the following new section:

"Sec. 310. (a) Notwithstanding the decisions of the Supreme Court in *Grove City College et al. v. Bell, Secretary of Education, et al.* and in *North Haven Board of Education et al. v. Bell, Secretary of Education, et al.*, the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

(d) Title VI of the Civil Rights Act of 1964 is amended by adding at the end thereof the following:

"Sec. 606. (a) Notwithstanding the decisions of the Supreme Court in Grove City College et al. v. Bell, Secretary of Education, et al. and in North Haven Board of Education et al. v. Bell, Secretary of Education, et al., the phrase 'program or activity' as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

"(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity' and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.".

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

MAR 31 1987

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to provide the Department of Education's comments on S. 557, a bill "To restore the broad scope of coverage and to clarify the application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964." While I strongly support a newly introduced Administration-sponsored bill restoring the Department's pre-Grove City enforcement of these important antidiscrimination statutes, I am opposed to enactment of S. 557 which would greatly expand their coverage.

To summarize, S. 557 would define the term "program or activity" for the purposes of four major antidiscrimination statutes in order to extend the coverage of those statutes beyond the limitations imposed by the Supreme Court's decision in Grove City v. Bell (1984).

In the Grove City case, the Supreme Court held that Grove City College, by virtue of its receipt of funds from students participating in the Department's Basic Educational Opportunity Grant (BEOG) program, was a recipient of Federal financial assistance, and was therefore subject to Title IX of the Education Amendments of 1972. Based on the "program or activity" language in the statute, the Court also held that Title IX coverage triggered by such Federal financial assistance extended only to the program or activity receiving the funds -- the college's financial aid program.

Prior to the Grove City decision, the Department of Education had interpreted the "program or activity" language in Title IX (more broadly than most courts) to mean that if Federal aid were extended to an educational institution, all of the institution's education programs and activities were covered. The Department of Education welcomes and supports legislation that, like H.R. 2061 and S. 272 in the 99th Congress, and similar legislation newly introduced on behalf of the Administration in this Congress, would restore our pre-Grove City interpretation of the scope of not only Title IX but the other major civil rights statutes as well -- to give jurisdiction over all aspects of a

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recipient's educational programs when any portion of the program receives Federal financial assistance.

Within the Department of Education, the Office for Civil Rights (OCR) is responsible for the administration and enforcement of those statutory provisions that have been affected by the Grove City decision. OCR must ensure that civil rights responsibilities embodied in those statutes are carried out by over 16,000 elementary and secondary education agencies and 3,200 colleges and universities, thereby ensuring that 58 million students in this country are afforded equal access to programs and activities receiving Federal financial assistance. Had the Administration's bill been adopted in the last Congress, OCR would be able to investigate cases and enforce the civil rights statutes in the same manner as it did prior to the Grove City case. None of the cases closed last year as a result of the Grove City decision would have been closed for that reason had the Administration's bill been enacted.

While the Department strongly supports legislation to restore the status quo of civil rights enforcement by the Department prior to Grove City, it does not support attempts to expand jurisdiction beyond its prior scope, as S. 557 proposes to do. It is important to understand that under past policies and practices, the Department of Education never claimed jurisdiction based on education funding over more than all facets of the education program in question. Prior to the Grove City case, jurisdiction was asserted by the Department over every facet of an institution connected with education; transportation of students, housing of students, employment of faculty and staff, athletics, extra-curricular activities, etc. whether or not the particular activity received Federal education grants. However, the Department of Education never claimed jurisdiction based on education funding over activities unrelated to education, such as the "real estate program" of an institution, or over patient care in a hospital run by a postsecondary institution.

The Education Department does not support S. 557's unwarranted expansion of jurisdiction beyond what existed under Department policies prior to Grove City. Intrusion into "non-educational" programs expand the Federal role well beyond that traditionally established, and into areas beyond the Departments' institutional and enforcement expertise.

S. 557, the so-called Restoration Bill, would amend the four civil rights acts to define "program or activity" as "all of the operations of" private entities and of entities providing certain social services. This would greatly broaden the scope of jurisdiction from pre-Grove City practices, as shown in the following examples.

Prior to Grove City, OCR/ED would not have accepted a complaint alleging discrimination by university administrators in connection with real estate investment properties owned by the university, when the real estate operation was in no way connected with the educational activities of the university. S. 557, however, would subject this and every other aspect of a university's operations, e.g., its publishing operations, or other quasi-commercial activity, however unrelated to providing education to students, to ED jurisdiction. (See Section 908 "all operations of" read together with Section 908(2)(A).)

Prior to Grove City, OCR/ED would not have accepted a complaint stating that a large private corporation, e.g., Widgit Corp., was receiving monies under the Vocational Education Act for participating in model programs for teaching computer repair and alleging discrimination against women in the management of Widgit's offices. S. 557 would subject the company's other operations, however unconnected with the educational activities of the corporation, to Education Department civil rights jurisdiction. (See Section 908 "all operations of" read together with Section 908(3)(A)(i).)

Prior to Grove City, OCR/ED would not have accepted a complaint alleging that a State prison, operated by the State Department of Corrections receiving Vocational Education Act funds discriminated against minority prisoners in the provision of paroles, because the complaint did not allege discrimination in any aspect of the educational program of the prison. It seems clear that the complaint would not be dismissed under S. 557. (See Section 908 "all operations of" read together with Section 908(1)(A) "a department, agency or state" or with (1)(B) "the entity of such State or local government that distributes such assistance.")

Prior to Grove City, OCR/ED would not have accepted a complaint alleging that a Kiwanis Club receiving Vocational Education Act funds to develop a demonstration project was discriminating against handicapped persons because its club meeting room was not accessible. The complaint would not have been accepted because it did not allege discrimination in any aspect of the educational program. It seems clear that this complaint would not be dismissed under S. 557. (See Section 908 "all operations of" read together with Section 908(3)(A) "or other private organization" (i) "if assistance is extended to such ... private organization ... as a whole.")

As should be clear from the foregoing examples, S. 557 would extend the reach of the four statutes to cover private sector entities in a much broader fashion than ever before. This type of coverage was never part of OCR/ED's enforcement scope prior to the Grove City case.

For corporations or not-for-profit organizations S. 557 would require in most cases that all activities of the entire entity be covered -- not just the sub-unit or department engaging in the educational program. This was never the case before Grove City.

S. 557 states that all of the operations of the corporation everywhere are covered if the corporation or private organization receives money "as a whole." There is no indication, however, of what "as a whole" means. Does it mean aid must go to a corporation without any restrictions? Does it mean that aid must first go to the corporate headquarters?

I am concerned that if S. 557 became law, social service organizations or businesses that previously felt a mission to support education might decide that the intrusion of the government into every aspect of their operations (and S. 557 makes it clear that all aspects of a covered entity's operations will be included) is not worth bearing. They may, therefore, withdraw from participating in the improvement of education.

In contrast, the Administration's bill would accomplish the stated intention of proponents of legislation to overturn the Supreme Court's decision in the Grove City case, without creating the additional, unnecessary confusion likely to be engendered by bills like S. 557.

The Administration's bill will do what needs to be done to restore jurisdiction over educational institutions. It amends not only Title IX, but also the three major parallel civil rights statutes, so that extension of Federal financial assistance to any program or activity of an educational institution creates civil rights coverage of all its educational programs and activities. The Administration's bill will also add a provision to each of the four statutes, making clear that in circumstances not involving educational institutions, the meaning of the phrase "program or activity" would remain the same as before Grove City and should be construed without regard to the Grove City or earlier North Haven Board of Education decisions.

The Administration's bill also addresses two serious concerns that arose during consideration of Grove City legislation in the last Congress:

Religious tenets. In 1972, when Congress enacted Title IX, Title IX contained the following exemption to its coverage: "(Title IX) shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization . . . ." 20 U.S.C. § 1681(a)(3). At that time, many religious institutions were controlled outright by religious entities. By contrast, many of these institutions are today controlled by lay boards, or are otherwise organized, so that they fall outside the exemption, even though they retain their religious mission and their affiliation with religious entities. A number of organizations, including the United States Catholic Conference, expressed concern about this development. In response, the House Education and Labor Committee adopted language in May 1985, that excluded from Title IX coverage "any operation of an entity which is controlled by a religious organization, or affiliated with such an organization when the religious tenets of that organization are an integral part of such operation, if the application of [Title IX] to such operation would not be consistent with the religious tenets of such organization."

The Administration's bill addresses the concern about adequately protecting religious tenets under Title IX, but replaces the Committee's language with language recently adopted by Congress in other legislation. This language appears in a statutory provision barring religious discrimination in the construction loan program -- in S. 1965, the Higher Education Amendments of 1986. In S. 1965 Congress used the following formulation: "The prohibition with respect to religion shall not apply to an educational institution which is controlled by or which is closely identified with the tenets of a particular religious organization if the application of this section would not be consistent with the religious tenets of such organization." (Emphasis supplied.) The Education Department believes that this language most clearly expresses the appropriate scope of the religious tenets exemption.

It should also be noted that there is precedent under other civil rights laws for employing a broader test than "control" for a religious tenet exception. For example, Title VII of the Civil Rights Act of 1964 currently contains a religious tenet provision that establishes a broader test than the "control" test in Title IX.

Abortion-neutral language. The Department of Education's Title IX regulations require a covered institution to treat an employee's termination of pregnancy like any other temporary disability "for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or services, and reinstatement, and under any fringe benefit offered to employees by virtue of employment." 34 C.F.R. 106.57(c). Moreover, the same treatment of termination of pregnancy applies to the provision of "a medical, hospital, accident or life insurance benefit, service, policy, or plan to any of its students. . . ." 34 C.F.R. 106.39. See also 34 C.F.R. 104.39. Thus, recipients of ED funds must, under Title IX, provide abortion benefits to employees or students if they provide benefits for any other "temporary disability."

In 1972, when Title IX was adopted by Congress, abortion was illegal in virtually all, if not all, States. The Roe v. Wade decision, nullifying such laws, was handed down by the Supreme Court in 1973. The Department of Health, Education and Welfare issued its Title IX regulations in 1975, incorporating the Roe v. Wade decision, rather than limiting the regulations to implementation of Title IX as it was enacted in 1972. There is virtually no reason to believe that Congress at that time intended Title IX to overturn State bans on abortions, let alone to mandate abortion coverage by institutions receiving Federal aid. Further, in subsequent years, Congress passed legislation (The Hyde Amendment) that expressly prohibits use of Federal funds for abortions, except in limited circumstances.

In response to these concerns, the House Education and Labor Committee in the 99th Congress adopted the following language as an amendment to a Grove City bill: "Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion." This language has been included in Section 2(d) of the Administration's bill. The language is intended to prevent educational institutions and others subject to Title IX from being required to perform or pay for abortions or abortion-related services as a consequence of receipt of Federal funds. This provision would continue to prohibit discrimination against persons who have had an abortion. Further, institutions that wish to perform or pay for abortions may continue to do so.

The abortion-neutral amendment would make Title IX consistent with Title VII, which also has an abortion-neutral provision so as "not to require an employer to pay for health insurance benefits for abortions."

In conclusion, the Department of Education strongly urges the Committee to support the Administration's bill. The language of S. 557 is ambiguous, and goes far beyond what the law was prior to Grove City. S. 557 opens the door for the courts to make expansive interpretations of the coverage of the civil rights statutes. No matter how the courts ultimately decide, S. 557 will almost surely result in increased litigation and uncertainty.

The Office of Management and Budget advises that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

William J. Bennett

William J. Bennett

LEGISLATIVE INFORMATION

Statement of the

National Education Association

On

S. 557

The Civil Rights Restoration Act

Labor and Human Resources Committee

United States Senate

MARY HATWOOD FUTRELL, President • **KEITH GEIGER**, Vice President • **ROXANNE E. BRADSHAW**, Secretary-Treasurer
DON CAMERON, Executive Director
(202) 822-7300

Mr. Chairman and Members of the Committee:

The National Education Association appreciates this opportunity to share its views on S. 557, the Civil Rights Restoration Act of 1987 -- one of the most critical civil rights issues of this era. The NEA represents 1.8 million classroom teachers, educational support personnel, and higher education faculty in each of the 50 states.

NEA regrets that is is necessary to negotiate anew an important matter once thought settled. Many of us had thought this nation had moved significantly away from the clutches of discrimination, but instead we are disturbed to find ourselves in the position of refighting old battles. Instead of moving forward on matters of civil rights, we are diverted by those who conspire to drive us back to the darker periods of this nation's history.

Some voices now ask Congress to abandon support for civil rights matters. They claim that somehow the protections enacted years ago are no longer necessary, and that unbelievably, the law has had too broad a reach and must now be curtailed. Those voices must not and will not go unchallenged.

NEA's strong, historic commitment to civil rights for those in our society who find themselves at a disadvantage because of sex, race, national origin, physical disability, or age, remains undaunted.

We believe that equality of opportunity is an essential element in the quest for educational excellence. Like millions of other Americans who believe in equity, NEA members stand firm in opposition to efforts that would erode our limited but important past gains. We will continue to fight for those principles which are the very essence of this nation's being: an unwavering dedication to fundamental fairness and equality.

Our members -- by Association resolution and action -- have time and again supported civil rights laws and protections, whether in matters of education or other arenas of national life, and sought to extend opportunity to all segments of our society. We will not shrink from that posture.

We strongly urge Members of the Senate to join us in reaffirming support for civil rights protections by moving swiftly to pass S. 557 -- the Civil Rights Restoration Act of 1987. This legislation -- which enjoys strong bipartisan support and has 56 Senate sponsors -- is essential to restore the basic safeguards provided by past law.

THE IMPACT OF GROVE CITY

Until the 1984 Supreme Court decision in Grove City v. Bell reinterpreted Title IX of the Education Amendments of 1972, the coverage of that statute and other major civil rights protections was clear. If an institution or agency received federal funds, discrimination was prohibited throughout the entire entity -- whether in relation to Title IX, Title VI of the 1964 Civil Rights Act, Section 504 of the Rehabilitation Act, or the Age Discrimination Act. And whether Democratic or Republican, every Administration implementing those laws followed that interpretation until now.

But the Supreme Court's Grove City ruling in one stroke set the civil rights movement back two decades, narrowing the scope of Title IX to only the specific program or activity receiving federal funds -- not the entire institution. The result of that ruling was simple: the federal government could legally subsidize discrimination. Its effects were immediate. On the same day, the Supreme Court's limited interpretation of Title IX was applied to a Section 504 case, Consolidated Rail v. Darrone. The U.S. Department of Education immediately put on hold or closed some 63 complaints pending in the Office for Civil Rights.

NEA members know first hand the impact of Grove City. While we do not keep centralized records of such occurrences, over the years our members have contacted us for assistance and advice on discrimination incidents and complaints. These incidents run the full range of potential claims under all four civil rights statutes. We also are involved in litigation on some of these.

THE CIVIL RIGHTS RESTORATION ACT

Enactment of the Civil Rights Restoration Act is critical to restore protections against discrimination on the basis of sex as well as those based on race, national origin, physical disability, and age. The reason? The U.S. Department of Justice has applied the same interpretation to other major civil rights laws as it has to Title IX. The Grove City issue is not just an education matter, but rather a major civil rights issue. Fundamental guarantees are in jeopardy. S. 557 is a comprehensive yet measured approach to correct his tragic situation. Yet there are those who would stand in the way of restoring these historic safeguards.

The Civil Rights Restoration Act of 1985 does not expand coverage of the four major civil rights laws. It merely restores these basic civil rights statutes to their pre-Grove City status.

The legislation before you today represents an honest attempt to deal with concerns raised over last year's civil rights measure, but it does not broaden the laws in any way.

o Those who were not previously deemed recipients under past civil rights statutes would not be recipients after passage of the Civil Rights Restoration Act. No exceptions from past coverage are allowed under this bill, nor are any additions made.

o Exemptions for religiously controlled institutions under Title IX remain unchanged by S. 557. In fact, this version of the bill makes clear that the religious exemption is as broad as coverage.

o Clarification has been made to ensure that "ultimate beneficiaries" remain excluded from coverage and that the small provider exemption, under Sec. 504 remains unchanged from current law.

o The bill also includes the same pinpointed approach to termination of federal funding for those found to be in violation of the law. Fund termination will continue to be utilized as a last resort after efforts to achieve voluntary compliance have failed. It should be noted that no fund termination has ever occurred during the life of Title IX.

o Other enforcement provisions remain unchanged. Funding agencies will continue to have the option of securing enforcement through referral to the Department of Justice. The right of individuals to sue privately also remains the same. It is critical, Mr. Chairman, that these parameters be understood.

S. 557 lays out institutionwide coverage to ensure that federal dollars shall not subsidize discrimination in any institution receiving support for any or all of its programs or activities.

Let me reiterate, Mr. Chairman, NEA believes that the single purpose of S. 557 is expressed in its title. The single issue in this important civil rights measure is discrimination. The single goal is restoration. And we urge the Senate to limit its consideration of this bill to the real issue at hand. Ancillary matters -- such as abortion, busing, and expanding the "religious exemption" provisions of Title IX -- have no part in the consideration of S. 557.

NEA opposes amendments which would substantively change existing civil rights laws.

The strong bipartisan backing for this legislation in Congress is mirrored by the broad-based support of students, elementary and secondary education personnel, and college leaders who also seek its passage. The breadth of this support is further indicated by a coalition of over 150 national religious, labor, civil rights, senior citizen, disability rights and women's groups, and education organizations.

The importance of major civil rights laws is evident in the gains made since their passage. Since Title IX was passed in 1972, for example, the number of women participating in intercollegiate athletics has increased twofold; the number of women in vocational education has multiplied; 15,000 athletic scholarships have gone to women since 1972; women are making headway in graduate and professional college degrees in traditionally male fields. This, Mr. Chairman, is a law that has made a substantial difference in the lives of women and girls. It is a law that has had positive impact on our entire society.

While this is progress, Mr. Chairman, it is not fulfillment.

Women are underrepresented in all higher faculty ranks at both private and public institutions of higher education. Women have not made great inroads into postgraduate study in the physical sciences. Women's athletic programs are still underfunded as contrasted to total institution athletic programs. We have made gains, but we have not yet won the battle.

The Civil Rights Act of 1964 broke the back of Jim Crow in American society. It opened movie theaters, restaurants, and other public places. Employment discrimination against minorities and women in the private sector was banned under Title VII. Title VI has been the primary vehicle for desegregation of schools, hospitals, public systems of higher education, agricultural extension services, social service agencies, and public housing. And it has prohibited racial discrimination by recipients of federal financial assistance -- until now.

Section 504 of the Rehabilitation Act has meant that many Americans -- including school employees and students -- no longer face artificial barriers to their participation and advancement in our society. Disabled individuals have made great strides in education in the last decade; their numbers as students have increased tremendously at institutions of higher education. The elimination of physical and legal barriers has opened the doors not only to education but also to employment, to housing, and to medical services for this segment of our population.

The Age Discrimination Act has opened opportunities for Americans through the span of life. That these protections were important to older Americans is evident in the complaints filed since then. Sadly, the majority of those complaints have been educational in nature and cite denials of admission to colleges and universities. Other cases have related to health services, housing, the denial of food stamps, and access to rehabilitation programs.

Yet all of these statutes now stand in jeopardy.

Grove City has been cited by numerous judges and civil rights enforcement agents as a rationale for not pursuing complaints of civil rights violations. As just two examples:

o A disabled individual, who was denied access to a flight unless he would sign a release form, was determined to have no basis for the complaint-even though the airline received federal susidies for its flights betwen small towns-because he was flying between two large cities, rather than between small communities.

o A college professor filed a complaint that she had been dismissed on the basis of age, but the Department of Education claimed to have no jurisdiction because the building in which she taught was not constructed with federal funds

We must not allow those who conspire to turn back the clock to the days when discrimination was acceptable -- by government law as well as by social practice -- to succeed. That would poison the future of today's school children and limit their ability to develop to their fullest potential. For this nation, which already has paid too high a price for past inequities, that would be a tragedy.

Let us reaffirm this nation's heritage of civil rights progress. Pass S. 557 without further delay.

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

APR 24

The Honorable Edward M. Kennedy
Chairman, Committee on Labor and
 Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This is in further response to your letter requesting information about the effect on the Department of Transportation's enforcement of civil rights statutes of the Supreme Court's decision in Grove City v. Bell. I provided an interim response to you on March 27.

The answers to your questions are as follows:

1. Copies of all guidelines, directives, memoranda, letters or other documents issued by the Department of Transportation or any of its officials, including those employed in the Office of General Counsel, Civil Rights Enforcement unit, or Regional Offices, which contain reference to or an interpretation of the Grove City decision or to the concept of "program-specificity."

   With the exception noted below, the Department has not issued any guidelines, directives, memoranda, letters or other documents concerning the Grove City decision. However, the Departmental Office of Civil Rights did provide a copy of the decision to each modal administration Office of Civil Rights. The enclosed memorandum from the Federal Aviation Administration's Chief Counsel to its personnel office mentions the effect of the decision (see p.6, third paragraph).

2. Identify all audits, compliance reviews, and complaint investigations of recipients of federal financial assistance undertaken pursuant to Title IX, Title VI, Section 504, or the Age Discrimination Act, that have been terminated, dismissed, suspended, or narrowed in scope at the investigative or review stage as a result of the Grove City decision, or any other decision concerning the "program-specificity" nature of such statute.

   There was one complaint that was dismissed on "program-specificity" grounds. The recipient was the Iowa Department of Transportation in Region VII, Complaint No. 86-518. The complainant alleged that the Iowa Department of Transportation discriminated against him on the basis of his handicap, hearing impairment, when it (Iowa Department of Transportation) refused to provide him with a sign language interpreter so that he could understand the safety materials presented in the Driver Improvement Program class. The funds provided under the National Highway Safety Act of 1966, as amended, were used in the following areas: (1) automation for driver accident data; (2) safety training programs for engineering personnel; (3) traffic engineering assistance programs; (4) accident and analysis assistance; and (5) traffic safety research program. The record evidence revealed that the Driver Improvement Program classes are taught at a local community college and that tuition is paid to the college, which hired the instructor and provided the class materials. The Iowa Department of Transportation is provided the names of the students that attend the classes by the college. Federal funds were not used to finance the program.

Since the programs that received the section 402 funds are not being used for the Driver Improvement Program classes or to pay the Iowa Department of Transportation's hearing officer, it was concluded that the Department could not take enforcement action against the Iowa Department of Transportation. A copy of the Department's decision is enclosed. It should be pointed out that this decision would have been made in the same way under the Department's civil rights regulations as they existed prior to the *Grove City* decision. The Department's disposition of the complaint was, therefore, not a "result" of the *Grove City* case.

3. Identify all proceedings against recipients of federal financial assistance undertaken after a finding of non-compliance with Title IX, Title VI, Section 504 or the Age Discrimination Act that have been terminated, dismissed, suspended, or narrowed in scope as a result of the *Grove City* decision, or any other decision concerning the "program-specific" nature of such statute.

There have not been any proceedings taken against recipients after a finding of non-compliance that have been terminated, dismissed, suspended, or narrowed in scope as a result of the *Grove City* decision or any other decision concerning the "program-specific" nature of such statute.

4. Identify all cases dismissed for lack of jurisdiction or otherwise terminated since February 28, 1984, where the reason for termination or dismissal is not recorded or where it cannot be ascertained from departmental records whether *Grove City* played a role in such dismissal or termination.

There have not been any cases dismissed for lack of jurisdiction since February 28, 1984 where the reasons are not recorded. We maintain a log of all complaints received and closed, as well as the final disposition of complaints.

5. Identify and provide copies of all decisions by the department's administrative law judges that have relied in whole or in part on Grove City or any other judicial opinion concerning the program-specific nature of the aforementioned statutes.

   There have been no such decisions.

6. Identify and provide copies of all decisions rendered by any departmental reviewing authority, including the Secretary or head of any regional office or civil rights enforcement unit, that have relied in whole or in part on Grove City or on any other judicial opinion concerning the program-specific nature of the aforementioned statutes.

   Other than the Iowa case referred to in response to question 2, there have been no such decisions.

7. To the extent the department's civil rights enforcement procedures have been curtailed, expanded, or otherwise changed or modified in any respect as a result of the Grove City decision, specify in detail the nature of such changes and include the average time per case spent by the Departmental personnel before and after the Grove City decision to ascertain departmental jurisdiction over recipients of federal financial assistance.

   There have not been any changes in the Department's civil rights enforcement procedures primarily because it is the opinion of the Department that we have always had jurisdiction, for purposes of Title VI and similar statutes, over only the programs or activities, or portions thereof, that receive DOT financial assistance. The Department's civil rights rules, including those promulgated before the Grove City decision, have always incorporated this "program specificity" concept.

8. Identify with specificity all instances where the department's regional offices and complaint intake units have declined to investigate or otherwise pursue, for reasons related to the Grove City decision, complaints of discrimination made by beneficiaries of the aforementioned statutes.

   There have not been any complaints that we declined to investigate or pursue for reasons related to Grove City or "program-specificity."

As this information indicates, the *Grove City* decision has not had a significant effect on the Department's civil rights enforcement practices. This is true, at least in part, because the Department's major financial assistance programs (e.g., the highway, mass transit, and airport programs) provide assistance for virtually the entire scope of recipients' programs and activities. Consequently, few "program-specificity" issues arise.

Sincerely,

Rosalind A Knapp

Rosalind A. Knapp
Deputy General Counsel

Enclosures

SEP 9 1986

Complaint No. 86-518

Sarah S. Geer, Esquire
Staff Attorney
National Association of the Deaf
Legal Defense Fund
800 Florida Avenue N.E.
Post Office Box 2304
Washington, D.C. 20002

Dear Ms. Geer:

We have completed our investigation of the handicap discrimination complaint you filed on behalf of your client, Mr. Kevin Clift, against the Iowa Department of Transportation. The complaint alleged that Mr. Clift was discriminated against on the basis of his handicap, hearing impairment, when the Iowa Department of Transportation refused to provide a sign language interpreter so that he could understand the safety materials presented in the Driver Improvement Program class.

The record evidence reveals that the Driver Improvement Program classes are taught at the local community college. The tuition is paid to the local community college, which hires the instructor(s) and provides class materials. The Iowa Department of Transportation is provided the names of the students that attend these classes and may occasionally monitor the class content.

The Assistant Attorney General contends that the Iowa Department of Transportation's Hearing Officer gave Mr. Clift and others, the choice of taking the class or license suspension. The Iowa Department of Transportation further contends that Federal funds are not used to finance administrative programs.

The record further established that the funds provided under Section 402 of the National Highway Safety Act of 1966, as amended (Section 402), are used in the following areas: (1) Automation of driver accident data; (2) Safety training programs for engineering personnel; (3) Traffic engineering assistance programs; (4) Accident and analysis assistance and (5) Traffic safety research program.

The record evidence revealed that the Section 402 funds are not being used for the Driver Improvement Program classes or to pay the Iowa Department of Transportation's hearing officer. Since the Department's Section 402 funds are limited to the above programs, the Department's coverage under Section 504 of the Rehabilitation Act of 1973, as amended is limited to those programs receiving Federal financial assistance.

As a result the above explanations and facts, the Department concludes that it can not take any enforcement action in this matter since the alleged discriminatory program does not receive any DOT financial assistance. Therefore, this complaint is being closed in our files.

Sincerely, ORIGINAL SIGNED BY

ORIGINAL SIGNED BY

William T. Hudson
Director of Civil Rights

U.S. Department of Transportation
Federal Aviation Administration

Memorandum

Subject: ACTION: Aviation Science Program, Grant Agreements

Date: MAR 27 1986

From: Senior Attorney, EEO/Civil Rights, General Legal Services Division, AGC-100

Reply to Attn of:

To: Virginia H. Krohm, APT-200

In accordance with our discussions on March 19 and 20, 1986, I am forwarding the suggested modifications to the new version of the grant agreement prepared for use in the ~~Aviation~~ Airway Science Program.

The modifications relate solely to the civil rights and equal employment opportunity obligations of recipients of Federal financial assistance. They reflect recent developments and requirements which are not covered in Office of Management and Budget (OMB) circulars or regulations. For your information, we are providing the rationale for each recommendation, as well as the suggested wording or placement of the various assurances.

1. Organization of Agreement

Presently, the document is organized in two parts - the "Grant Agreement" and the "Sponsor's Assurances." Paragraphs 5, 6, and 7 of the Grant Agreement, however, deal with matters that ordinarily are treated as assurances. These should be transferred to the Sponsor's Assurances section with the following modifications or deletions:

Para. 5: Retain the following in the Grant Agreement section:

> "The Sponsor shall operate and maintain the facilities and equipment as provided in the Application for Federal Assistance and Sponsor's Assurances, each of which is incorporated herein."

Move the balance, modified as follows, to the Sponsor's Assurances:

> "Civil Rights. The Sponsor will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where the Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or

> structures or improvements thereon, in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (1) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits or (2) the period during which the sponsor retains ownership or possession of the property."

Rationale: You will note that we have deleted "creed" from the grounds prohibiting discrimination. That is because there is no statute, applicable to universities, which prohibits discrimination on the basis of religion or creed in the provision of benefits, services, or employment resulting from Federal financial assistance. The original civil rights act preventing discrimination by the recipients of Federal financial assistance dealt only with the grounds of race, color, or national origin. (Title VI of the Civil Rights Act of 1964).

The statutes passed since then really are progeny of Title VI, which fill some of the gaps left by the parent statute. Title IX of the Education Act Amendments made it illegal for educational institutions to discriminate on the basis of sex, but did not affect other types of recipients; the Rehabilitation Act of 1973, as amended in 1978, prohibits discrimination by any recipient of Federal assistance on the basis of handicap, etc. In regard to airport aid, we do have statutes preventing discrimination on the basis of creed - Section 30 of the Airport and Airway Development Act of 1970, as amended in 1976 and Section 520 of the Airport and Airway Improvement Act of 1982 - but these do not apply to the universities now receiving grants under the Aviation Science Program.

The rest of the suggested assurance is exactly the same, however, as Assurance No. 30, presently used by the agency in its grant agreements with airport sponsors. We believe there is merit in uniformity in this instance.

Please note that the above recommended assurance replaces part of of your present Assurance No. 17, i.e, the second sentence, which reads:

> "These assurances, certifications, or covenants shall remain in full force and effect throughout the useful life or (sic) the construction or equipment acquired under this Project, but in any event not to exceed 20 years from the date of said acceptance of an offer of Federal aid for the Project."

The 20 year limitation is incorrect. We recognize that it has appeared in some Advisory Circulars issued by predecessors of the Associate Administrator for Airports. The error has been corrected by the Airports Office of Planning and Programming (APP-1) in its most recent Advisory Circular (AC 140/5100-15, September 24, 1984).

Assurance No. 17 - Revise in the Sponsor's Assurances Section:

Although we are dealing with the Grant Agreement Section at this point in our memorandum, the foregoing relates to your Assurance No. 17 in the Assurances section, so we will revise No. 17 now. Basically, the general Civil Rights Assurance makes unnecessary the first sentence in your present No. 17. It can be changed, therefore, to read simply:

> "Any breach of the assurances, certifications, or covenants on the part of the Sponsor which cannot be corrected by informal means, may result in the suspension or termination of, or refusal to grant Federal assistance or to continue Federal financial assistance under FAA administered programs, or such other action authorized by law as may be necessary to enforce the rights of the United States under this agreement."

We have changed the wording of No. 17 slightly, to make it conform more closely to what has become a fairly standard clause, derived from 49 CFR 21.13(a), the DOT regulations implementing Title VI of the Civil Rights Act.

Para. 6 of the Grant Agreement Section:

This paragraph should become an Assurance in the Sponsor's Assurances and be changed as follows:

> "The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds provided under this agreement. In this regard all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts."

Rationale: Except for the last sentence, this is the standard clause that presently applies to all FAA recipients of Federal financial assistance. Ordinarily, it no longer is inserted in the grant itself. Instead, the recipient simply assures that it will comply with all the requirements of 49 CFR Part 23. The clause must be inserted in the Federally-assisted contracts let by the recipient, however, and since this is not stated clearly in the standard assurance, we have added the last sentence.

APP-1 has produced a fair amount of guidance to the field to eliminate some ambiguities in the regulation. The universities have not been privy to this guidance, so we have no problem with your being more specific than APP-1 in its grants. The MBE

(?)

Regulation, in fact, still states that the clauses in section 23.43(a)(1) and (2) must be placed in the grant agreement as well as in the contracts. The FAA Offices of Civil Rights, Airport Planning and Programming, and the Chief Counsel, however, obtained permission from the General Counsel's Office to eliminate some of the lengthy assurances and to substitute references to the various civil rights statutes and regulations. In view of the universities' unfamiliarity with these regulations, however, it may be well to include the clause in (a)(1) as well as the above, which is (a)(2). To make it suitable for inclusion in the Sponsor's Assurances section, we have modified it as follows:

> "The recipient or its contractor agrees to ensure that it will carry out the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, the MBE requirements apply to this agreement."

Paragraph 6 as it presently appears in your document is incorrect because it confuses portions of the Disadvantaged Business Enterprise (DBE) Regulation, implementing Section 105(f) of the Surface Transportation Act, and portions of the Small Business Act with the MBE Regulations promulgated by the DOT in 1980. Only the latter applies to FAA recipients of Federal financial assistance. The DBE Regulation applies to those operating administrations of the DOT which receive sizeable funding from the Surface Transportation Act. The Small Business Act applies to direct Federal contracting, rather than Federally assisted contracting. There is a slight connection in that an MBE/WBE can qualify as such only if it is "small," as defined in Section 3 of the Small Business Act. There is no requirement, however, for the FAA that the MBE's/WBE's be "socially and economically disadvantaged."

Para. 7: Delete all reference to 49 CFR Part 21, Appendix C(a)(1)(x).

This paragraph is obsolete in that it deals with an agreement made with the Office of Minority Business Enterprise (OMBE) before the DOT MBE Regulation was promulgated. Section 23.1(b) of the MBE Regulation states:

> "This regulation supersedes all DOT regulations issued previously under these authorities (including Title VI), insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs."

The OMBE Agreement, therefore, no longer is in effect. Furthermore, OMBE no longer exists.

2. Sponsor's Assurances

In addition to the changes already made in the preceding pages, the following are necessary:

Para. 8: Architectural Barriers Act

This should be rewritten as follows:

> "It will require the facility to be designed to comply with the Uniform Federal Accessibility Standards (49 Fed. Reg. 31528, August 7, 1984, adopted by the General Services Administration (GSA) in 41 CFR 101-19.6, effective August 7, 1984). The applicant will be responsible for conducting inspections to insure compliance with these specifications by the contractor."

Rationale: The Uniform Federal Accessibility Standards (UFAS) represent an agreement between the four agencies (General Services Administration, Housing and Urban Development, Defense, and the Postal Service) to minimize the differences between the standards that had been developed by them in accordance with the Architectural Barriers Act, 42 U.S.C. 4151-4157. As much as possible, the UFAS are consistent with guidelines issued by the Architectural and Transportation Barriers Compliance Board (ATBCB) and with the standards published by the American National Standards Institute (ANSI), which they supersede. We have cited the GSA Code of Federal Regulations, because the GSA prescribes standards for all buildings not covered by standards issued by the other three agencies.

Para. 11: Title VI Assurances

Delete this assurance.

Rationale: DOT Order 1000.2B, January 19, 1977, "Implementation of the Department of Transportation Title VI Program," still is in effect and requires the insertion of lengthy assurances, basically as set forth in the order. The FAA obtained permission to simplify and clarify them, however, and in the case of airport projects, the revised versions appear only in the first grant received by a recipient for construction, the purchase of land, or for noise implementation projects. Thereafter, the FAA may use a simple reference to the Title VI statute and the implementing regulations. The order also specifies clauses that must be placed in every Federally assisted contract and in leases on the facility, however, and these should be attached to the grant agreement.

Since the universities are receiving "first grants" in most instances, the complete assurances should be attached, as well as the clauses. For your convenience, we are attaching copies of those which appear in Advisory Circular 150/5100-15. I am unfamiliar with the process used to fund universities prior to this particular effort, which now may be receiving second grants. If grants were used and if they did not contain the appropriate assurances and clauses, then these should be attached to the present grants.

In regard to the earlier grants, it may be that those also did not contain the appropriate assurances. Since some assurances run as covenants in deeds, those grants really should be amended, even if all the money has been awarded and spent.

I should mention here that Grove City College v. Bell, 104 S. Ct. 1211 (1984) requires that the obligations imposed by the Federal agency be "program specific." On airports, the entire airport is considered the program, since the various aspects of the program are not divisible. The Supreme Court has ruled that in universities, however, the program consists only of the one that actually receives the funds. The contracting and leasing clauses thus apply only to activities that will be related to the Aviation Science Program.

Executive Order 11246

E. O. 11246 is implemented by Title VII of the Civil Rights Act and the implementing regulations of the Department of Labor in 41 CFR Part 60. It imposes detailed requirements upon recipients of Federal financial assistance and upon Federally assisted construction contractors and subcontractors, i. e., those firms paid with the Federal funds.

While Part 60 may be revised in the near future, at present, the obligations still apply. They are presented succinctly in APP-1's Advisory Circular in Appendices 4 through 6. A copy of that appendix is attached for your information.

I do not know how much experience the universities have had with E. O. 11246. It may be advisable to attach the requirements to the grant agreement.

Note that E. O. 11246 results in a prohibition against discrimination on the basis of religion in employment and related practices, but it does not alter the fact that there is no prohibition against discrimination on the basis of religion (creed) in the provision of services and benefits to the public - ultimate beneficiaries of the Federal financial assistance.

Title IX of the Education Act Amendments

I see no reference to Title IX of the Education Act Amendments in the Grant Agreement or Sponsor's Assurances. As mentioned earlier herein, Title IX is one of the progeny of Title VI, but prevents discrimination on the basis of sex in the programs receiving Federal financial assistance in educational institutions. Since the DOT does not have a regulation implementing Title IX, we have no assurance to insert in your documents. Instead, we will simply add it to the list of civil rights statutes, etc. in the Assurances section, which must be followed by the recipient.

APP-1's Assurances, Part V of the Grant Agreements

Also attached is the Assurances format used by APP-1. You will note that the assurances relating to civil rights (for grantees not receiving the first grant) are simple referrals to the various acts, Executive orders, and regulations. In addition, there is a general assurance, No. 30, which prohibits discrimination on all the bases covered by the authorities that apply to airport grants. As we already have discussed, these differ somewhat from those that apply to universities, and we have prepared a general assurance for you to use (see pages 1 and 2 herein - modification of your para. 5 in the Grant Agreement section).

Part V of the Airports grant agreement includes para. C, the Sponsor's Certification that it will adhere to the various statutes, Executive orders, and regulations listed. We already have given you three kinds of assurances: (1) A general one; (2) Assurances that must appear within the grant agreement; and (3) Assurances or requirements that will prove useful to the sponsor but which could be eliminated in the grants of sponsors very familiar with the processes, or, the case of airport sponsors, those who have received previous grants. A few civil rights laws, however, require no assurances, such as the Rehabilitation Act of 1973 (29 U.S.C. 794).

Given this mix of assurances, we suggest you include a Sponsor Certification of the following type:

> "Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:
>
> 1. General Federal Civil Rights Requirements. It will comply with all applicable Federal laws, regulations, Executive orders, policies, guidelines, and requirements as promulgated or issued and as specified in the Assurances herein, as they relate to the application, acceptance, and use of Federal funds for this project, including but not limited to the following:
>
> Federal Legislation and Executive Orders:
>
> a. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
>
> b. Age Discrimination Act of 1975 - 42 U.S.C. 6101 *et seq*.
>
> c. Architectural Barriers Act of 1968 - 42 U.S.C. 4151 *et seq*.

d. Executive Order 11246 (employment in Federal or Federally assisted contracting), 3 CFR Part 169, 42 U.S.C. Section 2000e, issued September 24, 1965.

e. Title IX of the Education Act Amendments, 20 U.S.C. Sections 1681 et seq.

e. Rehabilitation Act of 1973, 29 U.S.C. Section 794.
Federal Regulations

a. 49 CFR Part 21 - Nondiscrimination in Federally-Assisted Programs of the DOT - Effectuation of Title VI of the Civil Rights Act of 1964.

b. 49 CFR Part 23 - Participation by Minority Business Enterprise in DOT Programs.

c. 49 CFR Part 27 - Non-Discrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

d. 41 CFR Part 60 - Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and Federally Assisted Contracting Requirements)."

Dave Micklin, ACR-4, and Ben Castellano, APP-510, and I work very closely on matters such as these, and I strongly suggest that you coordinate the final product with their offices. If you have any questions, please let me know (426-3475).

Irene H. Mields
Senior Attorney, AGC-100
General Legal Services Division

Attachments

PVA

PARALYZED VETERANS
OF AMERICA

Forty Years of Service
1947–1987

STATEMENT FOR THE RECORD

BY

DAVID M. CAPOZZI, ASSOCIATE ADVOCACY DIRECTOR

PARALYZED VETERANS OF AMERICA

ON S.557

THE CIVIL RIGHTS RESTORATION ACT OF 1987

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

APRIL 10, 1987

801 Eighteenth Street, N.W., Washington, D.C. 20006 (202) USA-1300
Chartered by the Congress of the United States

Mr. Chairman and Members of the Committee, on behalf of the members of the Paralyzed Veterans of America, I would like to thank you for conducting hearings on S.557, the "Civil Rights Restoration Act of 1987". We appreciate the opportunity to provide you this written statement for the record expressing our support for this important piece of legislation.

I would like to briefly explain the nature of the Paralyzed Veterans of America (PVA). Since its founding in 1947, PVA has been in the forefront in organizing and ensuring quality health care and rehabilitation and in providing specialized assistance for veterans with spinal cord injury or dysfunction. In addition, PVA strives to assist all handicapped individuals through a broad range of programs designed to provide fuller access to society.

Prior to the mid 1940's, few individuals survived a spinal cord injury. However, with the introduction of antibiotics during World War II, and subsequent medical advances, the life expectancy of an individual with a spinal cord injury today is nearly the same as the average life span for the population at large. With survival and increased longevity has come the need to learn how to cope with, and find solutions to the many problems associated with spinal cord injuries and dysfunctions.

Today, PVA -- chartered by Congress in 1971 to meet the special needs of the thousands of veterans who are paralyzed as a result of spinal cord injury or dysfunction -- is a nationally based organization with over 12,000 members, with more than 40 Chapters and Subchapters, and more than 50 national service offices located within the Veterans Administration system.

PVA's membership is small, primarily because of our membership requirements: all of our members are veterans who have experienced spinal cord injury or dysfunction, which has resulted in varying degrees of paralysis. Comprised almost equally of service and nonservice-connected disabled veterans, our membership resides in all fifty states, in the District of Columbia, Puerto Rico, and Mexico.

Pertinent to our testimony, I must emphatically state our displeasure with the fact that these ongoing hearings must be conducted. In our view, the Nation, Congress, and the American people in their own way, have pursued curtailment of the many forms of discrimination through legislation previously enacted into law. It has taken time, tremendous effort, and caused great sorrow only to nearly achieve what many were beginning to believe was within their grasp. But you know, and we know, that discrimination has not ended, and that it will not be terminated under its own volition. In review, we only need to examine the record to clearly see that Congress through the efforts of a few individuals failed to pass the "Civil Rights Act of 1984" and the "Civil Rights Restoration Acts of 1985 and 1986". These failures create a situation whereby our government is openly and blatantly repeating history by subsidizing discrimination. This is intolerable and must be rectified as quickly as possible.

The passage of the "Civil Rights Restoration Act of 1987" is important to PVA because our membership encompasses a broad spectrum of race, gender, and age. PVA, has diligently pursued and continues to pursue the removal of attitudinal and architectural barriers that prohibit social acceptance and involvement of the disabled person.

PVA maintains a firm posture that S.557 does not expand existing laws, but simply restores all civil rights laws. The Civil Rights Restoration Act of 1987 is designed to overcome the damaging effects of the Supreme Court decision in Grove City College v. Bell, which undermines much of the prohibition against discrimination in any "program or activity receiving federal financial assistance". The Court's interpretation literally does not recognize the original intent of Congress, but dramatically narrows the provisions of the enacted civil rights laws - the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Even today, many federal agencies have not yet finalized, or even begun to implement their Section 504 regulations. For too long, there has been too much foot dragging, and now there are those who are fearful that S.557 provides too much coverage, and they want to change the law, a law that has yet to be implemented to its maximum potential.

No American should be expected to tolerate one additional day of discrimination and PVA calls upon Congress to listen to the collective voice of many organizations to act now on the "Civil Rights Restoration Act of 1987." While the measure has received overwhelming bipartisan support from members in both the Senate and the House, it is indeed unfortunate that a few are willing to delay this important legislation. We are all together on this issue, and we shall not be divided. We will not rest until our civil rights are restored.

The Paralyzed Veterans of America joins in the efforts of the Leadership Conference on Civil Rights and other concerned organizations who demand the restoration of our civil rights. PVA believes that equal opportunity without enforcement of the law is not equal opportunity. We wonder if America can allow discrimination to continue to flourish and truly enjoy patriotism.

I would like to remind Congress that more than 20 years have elapsed since the passage of the "Civil Rights Act of 1964", and during the intervening years other laws have been passed. Yet, America has not achieved its goal to protect all of its citizens from discriminatory practices, Compliance with the laws has been consistently slowed down through the continuing tactics of delay and reissuance of directives or federal regulations. This in itself has created constant misinterpretation of the laws.

Most veterans served in the Nation's military to defend the rights contained in the Constitution, and the laws of the land. PVA, and its veteran membership, has demonstrated, since its foundation, a desire to terminate public and governmental discriminatory practices in programs receiving federal financial assistance. PVA urges the passage of S.557 in the first session of the 100th Congress. Civil rights reinforce more than equal opportunity; they offer a balanced sense of well-being and the ability to participate in our society. With passage of S.557 every citizen can truly acknowledge America's promise - Liberty and Justice for ALL!

PVA wishes to thank the Committee for the opportunity to present our views and comments upon the bill presently under consideration. We look forward to working with the Committees in Congress to assure that the goals of S.557 are reached.

STATEMENT OF GREGORY A. HUMPHREY, DIRECTOR OF LEGISLATION AMERICAN FEDERATION OF TEACHERS, AFL-CIO TO THE COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

March 19, 1987

Mr. Chairman and Members of the Committee:

I am Gregory Humphrey, director of legislation for the American Federation of Teachers. On behalf of the AFT, I want to thank you for this opportunity to state our views in support of the Civil Rights Restoration Act of 1987, S.557, and to briefly share with you the reasons it is imperative that this Act become the law of the land.

The American Federation of Teachers is in a unique position to understand the necessity for this legislation. Our union represents more than half a million teachers in primary and secondary schools across the country. In addition, we are the largest representative of college faculty members in the United States, with more than 80,000 members teaching in our nation's colleges and universities. The AFT also represents thousands of state employees and health care professionals who serve in our hospitals and health facilities. Most importantly, our union acts as an advocate of policies to advance the interests of our nation's children. We have a special obligation to students, an obligation that includes providing them with the best education possible, urging them to educational excellence, and protecting their interests when they are under assault. In the AFT's view, the Supreme Court decision in Grove City College v. Bell is a direct frontal assault on the educational opportunities of millions of students. The only proper response to this assault is the swift passage of the Civil Rights Restoration Act of 1987.

The Grove City case was wrongly decided. It defies Congressional intent, narrows the coverage of Title IX of the Education Amendments of 1972 and may seriously jeopardize educational equity for an entire generation of students and teachers. In the strict sense, Grove City narrows federal protection against sex discrimination so that it is limited to specific education programs or activities that directly receive federal funds. The AFT believes that Congress intended Title IX to apply to an entire institution. If one department of an educational institution is not in compliance with the law, then the entire institution should be considered as out of compliance. It is difficult to see how any other interpretation would be consistent with the purpose of Title IX. Without total coverage, institutions would be allowed to pick and choose federal aid programs, but ignore the requirements for equal access and protection of women, students and faculty which is incorporated in Title IX. The existing ruling is an open invitation for institutions who wish to benefit from federal aid but ignore the conditions that guarantee fairness in the use of federal funds.

In a broader sense, the impact of the decision is even more menacing. When the reasoning of Grove City is applied, as it has been to the other Civil Rights laws which prohibit those who receive federal funds from discriminating against minorities

(Civil Rights Act of 1964), the handicapped (Section 504 of the Rehabilitation Act of 1973), and the elderly (Age Discrimination Act of 1975), we are faced with a frightening possibility: the federal government could sanction and subsidize educational and non-educational institutions which discriminate. It is a reality we can ill-afford to tolerate and which will only proliferate if the Civil Rights Restoration Act of 1987 is not enacted.

As educators, we are primarily concerned with educational programs but we fully recognize that a student's education extends far beyond the classroom. Neither the student, nor society in general benefits when any institution overtly encourages or passively permits the unequal treatment of people. Students lose valuable educational experiences which cannot be recovered and the loss to society in terms of ideas, ideals and progress is immeasurable. As teachers and instructors, our members face the prospect of having their own employment and educational opportunities limited or curtailed.

Because of Grove City and this administration's policies, Civil Rights enforcement has been severely restricted, and, if the decision is allowed to stand, the potential for discrimination is virtually limitless. The results could be tragic. Who among us is prepared to tell our women athletes who have done so much for our country in international competitions, that they may not be able to participate in future sports activities in their universities or even at future Olympic events because the opportunities they have enjoyed for inter-collegiate or high school competition will no longer be required by Title IX?

The Civil Rights Restoration Act of 1987 is a sound piece of legislation which will clarify the intent of Congress and restore the principle Civil Rights statutes to the broad scope and coverage that was originally intended by Congress and has marked their enforcement until recently.

Since the Restoration Act's introduction in January of 1985, it has been amended. In the House, a bipartisan team of Members drafted a set of clarification amendments which were accepted by the House Judiciary and Education and Labor Committees. This year's bill incorporates these amendments. Fears that were raised regarding such issues as ultimate beneficiaries, the "Ma and Pa" grocery store, the scope of the Title IX religious exemption, and corporate coverage should now be laid to rest.

This legislation is also cost-effective. It imposes no additional obligation on those who receive federal financing and it will impose no additional burden on the Federal Treasury. In these days of budget cuts - including massive cuts in student aid and educational programs - and federal deficit concerns, members of Congress should be anxious to pass legislation which will protect the general welfare without adding to the federal red ink.

We at the AFT hope the message coming out of these hearings and this legislation will be loud and clear: federal funding of discrimination will not be tolerated in this country. We will not go back to the time when women athletes were a rarity. We will not return to the time when the rights of the handicapped were invisible. We will not return to the time when racial discrimination was a national disgrace.

Church Women United

Washington Office, Box 16
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Telephone. (202) 544 - 8747

President
Sylvia Ross Talbot, Ed.D.

General Director
Doris Anne Younger

TESTIMONY

DR. SYLVIA TALBOT

President of Church Women United

BEFORE THE

Senate Committee on Labor and Human Resources

ON

Civil Rights Restoration Act

March 19, 1987

Church Women United is a national movement of Protestant, Roman Catholic, Orthodox and other Christian women.

Senator Kennedy, Members of the Committee, my name is Sylvia Talbot, President of Church Women United, a movement of Protestant, Orthodox and Catholic women representing twenty-eight denominations and faith groups. Church Women United has over a half million members throughout the United States. Since its inception in 1941, six days after Pearl Harbor, we have been committed to the reconciliation of peoples, even in the face of great hostilities. God knows no East or West nor South or North. Our theology is one of a great reverence for life for all people of this earth.

I appreciate the opportunity of testifying on S 557, the Civil Rights Restoration Act, and we strongly oppose all efforts to weaken this legislation. Because of the pluralism of Church Women United, I believe our testimony can be useful to Congress as you struggle to restore to the majority of our people their basic civil rights. Our testimony will reflect two basic principles:

- respect for diversity, and
- discrimination against any group cannot be tolerated.

Church Women United has deep roots in the social fabric of our nation. Our unity did not come without conflict arising out of religious, class and racial diversity. Through examination of our divisions, we have learned to respect one another in our diversity. Most of all, we are committed to the protection of equal justice and oppose any effort to use diversity of race, sex, age, religion or diability as a basis for discrimination.

We believe conflicts can be resolved between nations as well as between people of different ethnic, religious, sex and age. As a society, we create laws as both ideals and as a minimum standard of social behavior that we expect of ourselves and others. As a Christian movement, we have been committed to and have succeeded in significant ways to break the barriers between religious and racial groups. In over 2000 towns and cities throughout this nation, Protestant, Catholic and Orthodox women have overcome the stereotypes of religious and racial prejudice through common worship, study and action projects which aim to alliviate the suffering of the poor.

In the '50's, CWU spearheaded an alternative loyalty oath to the McCarthy investigations; through educational programs and a petition with two million signatures, we debated the essence of patriotism. In the '60's we were part of the leadership to protest racial injustice and build a country of racial equality. In the '70's we initiated the 'Meals on Wheels' program and committed ourselves to legislation that would restore the respect and dignity of our elderly at a time when 'youth culture' was the norm. In the '80's, we have come to recommit ourselves to women reclaiming their rightful place in society - economically, socially, and politically.

These actions have not come easily in a movement of such diversity. Our religious, racial, regional, age and class differences have put us through many painful moments. We have asked ourselves how we can maintain unity - and at what moral cost for the principles in which we believe - should we search for unity. Unity can mean finding the least common denominator. This kind of unity means no one is satisfied and the dignity and respect with which each individual member should be accorded, is superficial and in fact a sham.

Our own history therefore, shapes our deep commitment to the restoration of the original intent of the civil rights laws; the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and The Age Discrimination Act of 1975. We believe that it is the rightful role of the federal government to effectively implement these laws equally and with vigor, in every state.

As you are most likely aware, since 1984 and the Grove City decision has adversely affected the protection of the Civil Rights of a number of our citizens. I site a number of cases that the NAACP Legal Defense and Education Fund have found. When deaf persons were summoned to serve as jurors in Los Angeles Superior Court, that Court refused to supply a sign language interpreter and also refused to pay for such services because the Court stated that although they had received federal funds in previous years, when this particular case appeared, that Court had not received federal funds. Is this justice?

In Fort Wayne, Indiana segregated schools have been maintained through manipulation of attendance boundaries, expansion and closing of facilities. Local officials claim that as discrimination does not occur in any federally-assisted programs the anti-discrimination laws are not applicable. Is this equal opportunity for all?

A student at the University of Vermont charged that her dismissal from the Master's English program violated the Age Discrimination Act because the professor who caused her dismissal had said that she was "too old" to get a degree. Her complaint was never investigated because the affected program was not funded by the Department of Education. Is this the way to afford respect to all of our citizens?

Cases of disparities between mens' and womens' athletic programs are common knowledge. Yet the incredible interpretation of _Grove City_ could be that if a person would be sexually harrassed in a non-federally funded building, her complaint would be rejected, but had she been sexually harrassed in a federally-funded building, her complaint would be justified. Is this just plain madness?

These cases give us examples of a minority of instiutions, and I would suspect it would be only a minority, that would try to find any and every loophole to circumvent the overriding moral standard of equality for all of our citizens. Many institutions over the years have set a standard that Civil Rights for all is right, as well as good business. Other institutions will try all means to perpetuate their prejudices. We saw how this happened openly for decades. In 1964 we said that was wrong. We must again underscore those beliefs. The whole nation suffers when any of its citizens suffer.

Before I close my testimony, I would like to urge in the strongest terms the passage of the Civil Rights Restoration Act without amendments. It is grievous that the divisive issue of abortion is being used to jettison the Civil Rights Restoration Act. There must be another strategy to safeguard the inalienable rights of ethnic minorities, women, the elderly and the disabled while at the same time fiercely protecting religious diversity?

Church Women United has debated, struggled and worked for religious plurality, crossing the bariers of Protestantism itself, and Protestant, Orthodox and Catholic beliefs. We believe that abortion is a divisive issue and one where there is no religious consensus. It is our position that in order to repect the integrity of each individual faith group, we cannot impose or superimpose any one position. It is also our position to allow each individual to act on her own moral, ethical and religious beliefs. I submit this may be the most sensible, the wisest action for this

Committee and thus National policy. For as a nation, we have come to a consensus that there can be no discrimination against people because of race, gender, age or disability. Let us restore those rights now.

As a women's organization, we are of course profoundly moved to protect and sustain life. Essential to this is the protection of persons from discrimination on the basis of race, gender, age and physical ability. Perhaps the bottom line is that to move towards this reverence of life, we have to work towards a society where our youth will again have hope in the future - that jobs and a meaningful life is possible for them. When you have hope, you develop confidence in yourself which means you can be depended on to control your own destiny. When one knows this, one begins to plan one's life - not let it happen. In our anxiety to repair quickly, we are often trapped into first aid treatment for serious pathological conditions.

In summary, we urge you to pass the Civil Rights Restoration Act without amendments for the following reasons:

-as a nation rich in its diversity, we need to demonstrate the respect for religious differences without imposing any one doctrine,

- restoration of the four Civil Rights Acts will make clear the manner in which the judicial and executive branch are to interprete and implement the anti-discrimination laws,

- restoration will insure that those institutions which seek to find loopholes in the law in order to continue to discriminate have no federal subsidy, and

-that this is a matter of simple justice. Women, ethnic minorities, the disabled and the elderly together are the majority of taxpayers to the public fund. We must be assured that federal funds are used to promote opportunities for all.

Painful to admit, racism, sexism, agism and discrimination against the disabled are reviving in some quarters. From coast to coast, we are experiencing incidents of hatred and social isolation. Can we look to you, can we depend on you in Congress to send a signal throughout our country that we in this nation have ideals - that we not only believe in those ideals but they must be implemented by law. We must remember that we are created equal - Gentile and Jew, male and female, slave and free.

Consortium for Citizens with Developmental Disabilities

The Consortium for Citizens with Developmental Disabilities (CCDD) unanimously supports the Civil Rights Restoration Act of 1987 (S.557). CCDD is a 50 member coalition of national consumer, provider and professional organizations which represents the interests of the thirty-six million Americans who have disabilities.

The Supreme Court's 1984 Grove City College v. Bell decision has severely limited the rights that persons with disabilities have under Section 504 of the Rehabilitation Act of 1973. This statute is the only federal civil rights law which guarantees equal opportunity to Americans with disabilities. Many state disability rights statutes are based on this law. It is crucial that Section 504 be maintained so that Americans with disabilities can become fully integrated into society as independent and productive citizens.

The erosion of Section 504's civil rights protections can be seen in a variety of post-Grove City court decisions and federal agency actions. Most importantly, such decisions have in no way been limited to education, as some assert. Courts and agencies have issued determinations which limit the 504 rights of persons with disabilities in employment, transportation and health care.

Ironically, the greatest cutbacks have occurred in employment coverage, the very area Congress specifically designed Section 504 to protect. On the same day that the Supreme Court handed down the Grove City decision it unanimously held in Consolidated Rail Corporation v. Darrone 104 S.Ct. 1248 (1984), that Section 504 covered employment regardless of the purpose of the federal funds. The Court stated that "HEW from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial assistance, regardless of the primary objective of the aid" 104 S.Ct. 1254. However the Court also held that Grove City's narrow interpretation of "program or activity" for Title IX would apply to Section 504.

This ruling has been used to thwart persons with disabilities in their efforts to seek legal recourse for employment discrimination. This is also ironic in light of the fact that the legislative history of the Rehabilitation Act of 1973 is replete with statements stressing the importance of equal employment opportunity to the ultimate goal of the Act — integration of all citizens with disabilities into the American mainstream.

Several cases illustrate the devastating effect the Grove City decision has had in this area. For example, Meyerson v. State of Arizona 740 F.2d 684 (9th Cir. 1984) involved a deaf psychology professor who brought an employment discrimination claim against the University of Arizona. The court ruled that the professor failed to prove that the discrimination occurred in a program receiving federal financial assistance because he did not show that he received federal research and instructional grants, even though many other professors in his department received such funding.

Similarly in Michigan Department of Corrections (OCR/Department of Education Docket Number 15-85-4402), Mr. X alleged that the Department of Corrections denied him employment as a parole/probation agent because of the fact that he was blind. OCR/ED closed the case without even investigating it. OCR/ED found that while the Department of Corrections received federal funds, the Bureau of Field Services, which employs parole/probation officers, did not receive federal monies directly.

These examples do not begin to tell the story of the number of cases that have been delayed as a result of the Grove City decision. Following the Supreme Court's ruling the Office of Civil Rights at the Department of Education and the Office of Civil Rights at the Department of Health and Human Services suspended several investigations in order to review agency jurisdiction. Many of these cases had been under investigation for years. Thus the entire investigatory process has become far more burdensome since Grove City.

Since Grove City the focus of investigations has turned toward tracing federal dollars instead of determining whether discrimination has occurred. We do not believe that this is what Congress intended when it passed Section 504 in 1973.

Section 504, more than any other piece of legislation is looked upon by Americans with disabilities as the hallmark of this nation's commitment to full integration and equal opportunity. Congress extended a promise of non-discrimination, which is not yet fulfilled. However, since its enactment Section 504 has opened doors which the Grove City decision is closing once more. The benefits of non-discrimination are realized not only by Americans with disabilities, who are the direct beneficiaries of Section 504, but also by society as a whole.

Equal opportunity is not only a moral and legal imperative; it is a good investment in the future. Congress must enact the Civil Rights Restoration Act of 1987 to reaffirm the basic principles of integration and equal opportunity through a clear clarification of its original intent. The Consortium for Citizens with Disabilities is confident that this nation's commitment to Americans with disabilities will not be abandoned.

UNITED FAMILIES OF AMERICA
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UFA

Hon. Mark D. Siljander
President

Robert L. Bartleson
Executive Vice President

Statement in behalf of United Families of America
By Robert L. Bartleson Executive Vice President
Submitted to Senate Committee on Labor and Human Resources
On April 8, 1987
Concerning proposed Senate Bill 557
Known as the "Civil Rights Restoration Act of 1987"

Mr. Chairman and members of the committee,

My name is Robert L. Bartleson and I represent United Families of America. United Families of America enthusiastically urges the Senate to oppose Senate Bill 557 known to many as the "Grove City BIll".

The "Grove City Bill" in its effort, unjustly, to curb discrimination on the basis of race, religion, sex or handicap is in itself discriminatory.

For organizations receiving their funds from a combination of direct federal aid, indirect federal aid, and private sources, the decision "What part is federal assistance and what part is private money?" represents perhaps the central question of their existence. For example, Planned Parenthood receives a large proportion of its funds from the federal government; it is illegal to use federal funds for abortion; Planned Parenthood is the nation's largest abortion provider. Therefore, for Planned Parenthood to continue its operations rests on its ability to segregate conceptually its direct federal funds from its other sources of revenue.

The "Grove City Bill" will break down this distinction between federal funding and non-federal funding, but with respect to only one purpose. It gives to the principle of non-discrimination, very broadly interpreted, a position paramount to any other consideration. Yet other types of proscription on the use of federal funds will remain limited to a program-specific interpretation, rather than binding non-federally funded activities.

You cannot break down this distinction in reference to one area of indirect funding without bringing all areas of indirect funding under the same umbrella. Broadening this principle in one area and remaining limited in another shows either a man who is confused or a man who knows no justice.

Although the Grove City case only dealt explicitly with the sex discrimination provisions in Title IX, three other civil rights statutes contained comparable language. The statute that concerns me the most is section 504 of the rehabilitation Act of 1973 which outlaws discrimination on the basis of handicap "under any program or activity receiving Federal financial assistance."

On March 3rd of this year the United States Supreme Court, in the case of School Board of Nassau County v. Arline, __ U.S. __ (1987), ruled that a communicable disease is a "handicap" within the meaning of that term in Section 504 of the Rehabilitation Act. Persons with Such a "Handicap" may not be discriminated against in employment. While the specific case dealt with a teacher who had tuberculosis, the priniciple the Court invoked would presumably also apply to persons with AIDS. In states with handicap provisions comparable to section 504, there has been a decided tendency for courts and administrative agencies to extend the law to prohibit discriminnation against

AIDS patients. Although most, if not all cases of AIDS in the U.S. have been attributed to the transmission of bodily fluids through sexual intercourse, the sharing of needles by intravaenous drug users, and the like, our knowledge of mechanisms for transmitting the disease is hardly complete enough to make us sanguine about the prospect of federally forced hiring of AIDS patients by university cafeterias and hospitals. Is it not discriminatory to ignore the health and wellbeing of the general public. What about the individuals right, of those who are forced to work with AIDS patients, to work in a environment free from physical and mental stress. Or the individuals right to eat at a restaurant free from disease.

The "Grove City Bill" in its efforts to stop discrimination accomplishes nothing more than an increase in the level of discrimination. A discrimination in a broad interpretation in one area while staying limited in another. A discrimination of the rights of an individual to live in world that is safe as possible from disease. For these reasons United Families of America and its members oppose Senate Bill 557 known as the "Grove City Bill".

87-20

Submitted Statement of the American Federation of Labor and Congress of Industrial Organizations to the Committee on Labor and Human Resources, United States Senate on S. 557, the Civil Rights Restoration Act of 1987

April 7, 1987

The AFL-CIO believes that S. 557, the Civil Rights Restoration Act is a corrective civil rights bill which should be enacted into law as soon as possible. Under four civil rights statutes enacted during the last 20 years -- Title VI of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments, Sec. 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975 -- the Congress made it plain that no institution which receives federal funds should be permitted to discriminate on the grounds of race, sex, disability or age. However, the Supreme Court's Grove City College decision ignored Congressional intent that Title IX of the Education Act Amendments of 1972 be construed broadly to give effective protection against discrimination in education. Since Title IX adopts language from the other statutes, the decision puts those other statutes in jeopardy. It is for this reason that a Civil Rights Restoration Act is so necessary now. Without it, thousands of women, older workers, and disabled or minority persons find themselves without remedy in the face of discriminatory practices.

We would particularly like to emphasize that we believe that the restoration principle should be the guiding principle in the consideration of this legislation. There will be efforts to add controversial provisions to the Civil Rights Restoration Act and those efforts should be resisted. S. 557 should not become a vehicle for any other civil rights agenda; its passage is too vital to become entangled in debate on non-germane issues.

Congress has prohibited discrimination by any entity which receives financial aid, and the Congress will reaffirm that commitment by enacting S. 557 without substantive amendments.

People For The American Way
The nonpartisan constitutional liberties organization.
ACTION FUND

Statement Submitted to the Senate Committee on Labor and Human Resources on the Civil Rights Restoration Act of 1987

People For The American Way, a 250,000 member, nonpartisan citizens' organization dedicated to the promotion of constitutional liberties, supports passage of the Civil Rights Restoration Act of 1987.

Three years ago, the Supreme Court's decision in Grove City v. Bell gutted the federal laws that prevented government supported discrimination. By limiting anti-discrimination regulations to only those parts of an institution which receive direct federal funding, Grove City has allowed millions of dollars of federal aid to flow to schools, hospitals, state and local governments and other institutions that discriminate.

In its Grove City decision the Supreme Court ignored the intent of Congress that Title IX is to be construed broadly to give effective protection against discrimination in education. Moreover, in the process, the decision similarly narrowed the coverage of civil rights enforcement under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975, and puts the coverage provided by these laws in jeopardy.

During the last three years women, minorities, the elderly, and the disabled have had no recourse to their federal government when they are discriminated against at federally funded institutions. As a result, we are witnessing the embarrassing specter of the Grove City decision being raised in court as a justification for discrimination. Further, scores of complaints and investigations have been ended or limited by federal government agencies responsible for enforcing the civil rights statutes and by the courts.

S. 557, as its name modestly suggests, simply restores the coverage of our civil rights laws. For two decades before Grove City, America grew as an opportunity society where each person, irrespective of race, sex, age or disability, had the chance to achieve his or her potential without government subsidized barriers. Today the federal government has turned back the clock and is once again disgracefully subsidizing discrimination. There is no better way to affirm the 200th Birthday of the Constitution which we observe this year than to restore civil rights to all Americans through passage of the Civil Rights Restoration Act of 1987.

League of Women Voters of the United States • 1730 M Street, N.W., Washington, D.C. 20036 • (202) 429-1965

Statement of Nancy M. Neuman, President

League of Women Voters of the United States

April 6, 1987

The League of Women Voters strongly suppports S. 557, the Civil Rights Restoration Act of 1987. The League believes that three years after the Supreme Court's devastating decision in the case of Grove City College v. Bell, it is time to restore civil rights protections to all Americans. Congress must act decisively to assure that the federal government will not subsidize discrimination against women, minorities, the disabled and older Americans.

Civil rights laws -- beginning with the Civil Rights Act of 1964 -- are based on the premise that no federal funds should be used to support discrimination. Before Grove City, it was understood that Congress intended that the entire institution receiving federal funds be prohibited from discriminating in any of its programs, regardless of the specific program in which the federal funds were used.

The Civil Rights Restoration Act was designed to restore four anti-discrimination laws -- Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Sec. 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 -- to the broad scope and coverage originally intended by Congress.

These four civil rights laws have been instrumental in bringing about change in lives of many Americans. One need only look at American women winning gold medals in the 1984 Olympics to see the progress that has been made in the last 20 years.

But much remains to be done to end discrimination against minorities, women, the disabled and older Americans. Girls still have difficulty gaining admission to vocational education programs; disabled Americans still face barriers; elderly people do not get equal services from health agencies; and minorities still encounter segregated schools and housing.

Since the Grove City decision in February 1984, the application of civil rights laws has been unpredictable, unfair and unacceptable. The League of Women Voters believes that the Civil Rights Restoration Act must be enacted without delay and without substantive amendment. This is a matter of simple justice.

STATEMENT OF THE NATIONAL COUNCIL OF JEWISH WOMEN TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES ON THE CIVIL RIGHTS RESTORATION ACT OF 1987

The National Council of Jewish Women strongly supports the passage of the Civil Rights Restoration Act of 1987. This legislation, drafted in response to the Supreme Court's Grove City College v. Bell decision in 1984, clarifies the language on four major civil rights statutes in order to avoid the narrow interpretation imposed by the Court. In that decision, the Court ruled that only the particular program or activity receiving federal funding was prohibited from discriminating on the basis of sex under the provisions of Title IX of the Education Amendments of 1972. Subsequently this ruling has set a precedent for enforcement of other civil rights statutes.

The Civil Rights Restoration Act of 1987 would restore the broad scope of protection that was originally intended by Congress when it enacted Title IX of the Education Amendments as well as Title VI of the Civil Rights Act of 1964, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1974. The Grove City ruling has dangerously impaired the enforcement of civil rights throughout this country. Legislative action is required to rectify this restrictive view of anti-discrimination safeguards. The National Council of Jewish Women supports the Civil Rights Restoration Act of 1987 as introduced without amendments which would serve to weaken the impact of this important legislation.

Established in 1893, the National Council of Jewish Women is the oldest Jewish women's volunteer organization in America. NCJW's more than 100,000 members in 200 Sections nationwide are active in the organization's priority areas of women's issues, children and youth, constitutional rights, aging, Jewish life and Israel.

April 7, 1987

**National Association
of Independent
Colleges and Universities**

March 31, 1987

The Honorable Edward M. Kennedy
Chairman
Senate Labor and Human Resources Committee
315 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Kennedy:

S. 557, The Civil Rights Restoration Act of 1987 is of critical importance to the National Association of Independent Colleges and Universities (NAICU) and we support the bill. NAICU represents over 800 independent institutions of higher education, including a broad range of institutions, from the large research university to the small church-related college.

We would like to first and foremost express our strong commitment to the social policy goals of equal opportunity for educational advancement regardless of race, sex, age or handicap. We embrace these social policy goals as part of our fundamental responsibility as institutions of higher learning. We, therefore, support the bill's broad coverage of our colleges on an institution-wide basis.

We do, however, have a serious concern about the existing Title IX religious tenet exemption language. NAICU believes that the current statutory exemption for institutions that are "controlled" by a religious organization should be revised to correspond with the changing pattern of religious higher education in this country. It is important to protect religious liberty interests effected by this legislation; such protection is not intended to undermine important nondiscriminatory principles embodied in Title IX and other civil rights statutes. NAICU will submit a statement for the record which describes in detail the substantive revisions that would alleviate our concerns.

We thank you for your consideration of our views on this important piece of legislation.

Sincerely,

Richard F. Rosser

Richard F. Rosser
President

Planned Parenthood®
Federation of America, Inc.

April 8, 1987

Sen. Edward M. Kennedy, Chairman
Labor and Human Resources Committee
United States Senate
Washington, DC 20150

Re: Civil Rights Restoration
Act of 1987 (S 557)

Dear Senator Kennedy:

I have reviewed the testimony of James J. Wilson, the City Counselor of St. Louis, Missouri, presented to your Committee on March 19, 1987.

Mr. Wilson testified that St. Louis has a contract with a private hospital ("Regional") to provide health care for indigent residents of St. Louis; and that Regional's doctors are associated with Washington University Medical Center. Mr. Wilson expressed the fear that Title IX, when amended by S 557, would either force Regional to nullify the policy of St. Louis against abortion, or would force Regional to sever its relationship with Washington University.

For the reasons that I explain below, that fear is baseless; but in order to place it in perspective, first I must outline the well-settled constitutional law governing the permissible limits to which a city (or any governmental entity) may go to enforce a policy against abortion.

The law is that a city can refuse to pay for abortion even though it pays for childbirth; but it cannot ban, prevent, or otherwise place unwarranted obstacles in the path of a woman seeking an abortion. This point was made explicitly in Poelker v. Doe, 432 U.S. 519 (1977), the case involving the St. Louis policy discussed in the Wilson testimony. Citing its decision of the same day concerning Medicaid funding of abortion (Maher v. Roe, 432 U.S. 464 (1977)), the Supreme Court stated:

> The constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth . . . [It is not unconstitutional for St. Louis] to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

432 U.S. at 521.

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This holding does not permit the banning of abortions in a hospital, such as Regional, that receives city funds. It only upholds the right of a city to choose not to subsidize abortions in that hospital. This distinction has been strongly affirmed in two cases subsequent to Poelker where federal courts have declared unconstitutional first a city's and then a state's efforts to ban abortions from publicly owned hospitals. In Nyberg v. City of Virginia (Minnesota), 667 F.2d 754 (8th Cir. 1982), cert. denied 462 U.S. 1125 (1983), the Court wrote:

> The City of Virginia and the Hospital Commission are not required to provide free abortions, hire doctors who will do abortions, or subsidize abortion services. The [lower court ruling] requires the City simply to allow staff physicians at the community hospital to perform paid abortions at the hospital . . . .
>
> There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.

667 F.2d at 758 (emphasis in original). Recently the United States District Court for the Western District of Missouri reached the same conclusion in declaring unconstitutional a state statute that made it unlawful to perform or assist abortions in public facilities. Reproductive Health Services v. Webster (No. 86-4478-CV-C-5, March 17, 1987, slip. op. at pp. 44-45).

Thus St. Louis can constitutionally refuse to pay for abortions. It cannot, however, prevent physicians - even at Regional, which receives substantial St. Louis funds - from performing abortions. Against this backdrop, I turn to the fear expressed in the Wilson testimony.

His fear is that S 557 will, unless St. Louis and Regional sever their relationship with Washington University, somehow result in St. Louis either paying for abortions, contrary to its policy, or facing liability for women being denied abortions.

Wilson seems to suggest that his fear extends beyond the question of St. Louis paying for abortions for indigent women at Regional to the question of abortions being performed at Regional. For the reasons outlined above, however, St. Louis cannot constitutionally interfere with the provision of abortions at Regional; it can only choose not to subsidize them.* Thus, if St. Louis is forbidding the provision of abortion services at Regional, it may already be acting unconstitutionally, regardless of S 557.

The most straightforward answer to Wilson's fear of funding is to recognize that Title IX, regardless of S 557, only covers (as relevant to this discussion) health and insurance benefits and services provided by an educational institution as part of an education program or activity to students or as part of a benefit program to employees. See 34 CFR Part 106, Subparts D and E. Thus Title IX does not reach Wilson's fear: health care provided to indigents and paid for by St. Louis.

Moreover, it is clear that it could not. All of the cases cited above make abundantly clear that St. Louis has the right to choose not to pay. St. Louis enforces that right by the terms of its contract with Regional. Even if Title IX were radically rewritten to reach the indigent patients at Regional who are treated by Washington University doctors at the expense of St. Louis (which S 557 does not do); it would still be another gigantic - indeed unimaginable - leap to suggest that, at that point, Regional or Washington University could nullify the right expressed in St. Louis' contract with Regional, and force St. Louis to pay for abortions. Rather, if this wholly improbably course of events came to pass, Regional or Washington University - not St. Louis - would be obligated to cover the costs of those abortions. Thus St. Louis would face no liability and its policy would remain intact.

For these reasons, I do not think the fears expressed in Mr. Wilson's testimony can be taken seriously. Rather, they appear to be a classic "red herring": something designed to divert attention from the real issue.

Very truly yours,

Roger K. Evans
Director of Litigation

RKE/ts

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*Apparently the St. Louis contract with Regional recognizes this because it only excludes abortions for "'authorized patients of the City or other non-authorized patients of the City.'" Wilson testimony at p. 5.

The National PTA
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Office of Governmental Relations
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Washington, D.C. 20036
(202) 822-7878

April 8, 1987

The Honorable Edward M. Kennedy
Russell Senate Office Building
Room 113
Washington, D.C. 20510

Dear Senator Kennedy:

The National PTA, an organization with nearly six million members, supports the passage of the Civil Rights Restoration Act, without amendments.

The National PTA membership is committed to the principles of equal opportunity for all children and youth. To that end, we have fostered policies that embrace legislation which safeguards an individual's civil rights. We hold a firm conviction that the federal government's role is to uphold and enforce basic civil rights protections as well as assist in ensuring access and equal opportunity to education.

Therefore, the National PTA believes that if comprehensive protection against discrimination is to be achieved, the Civil Rights Restoration Act of 1987 must be adopted. When the 1984 Supreme Court ruling in the Grove City College v Bell case limited civil rights coverage only to programs "directly" receiving federal funds, as opposed to institution-wide protection, thousands of individuals were subsequently barred from seeking recourse against discrimination based on national origin, sex, age or physical ability.

This year we celebrate the 200th anniversary of our country's Constitution. How appropriate to mark this historic occasion with the passage of the Civil Rights Restoration Act of 1987. Since our forebears first established the rules that govern us as a nation, Congress has created and modified laws to expand coverage of civil rights protections to all citizens. The Civil Rights Restoration Act will, when passed, be another step in the process of ensuring equal opportunity for all persons.

Sincerely,

Millie Waterman

Millie Waterman
Vice-President for
Legislative Activity

General Board of Church and Society
The United Methodist Church

March 30, 1987

The Honorable Edward M. Kennedy
Chair, Labor & Human Resources Committee
United States Senate
422 Dirksen Senate Office Building
Washington, D.C.

Dear Senator Kennedy:

I am writing in support of S.557, The Civil Rights Restoration Act of 1987, and in order to thank you for your strong leadership in assuring that this critical legislation is passed in the 100th Congress.

The United Methodist Church affirms in its Social Principles: "The rights and privileges a society bestows upon or withholds from those who comprise it indicate the relative esteem in which that society holds particular persons and groups of persons. We affirm all persons as equally valuable in the sight of God. We therefore work toward societies in which each person's value is recognized, maintained and strengthened."

The General Board of Church and Society has worked for the last three years to restore the original civil rights legislation to the intent of Congress when it was passed. We believe that it should be mandatory for an institution that receives public funds from the government to provide equal respect for men and women of all races, creeds, ages and physical conditions. We feel that it is urgent that the restoration of the civil rights of millions of American citizens lost in the Supreme Court's Grove City decision be a top priority of this nation.

Therefore, we are in support of a clean Civil Rights Restoration Act without substantative and crippling amendments. The urgency of restoring the rights of so many citizens leads us to call upon those who would use this important legislative vehicle to include amendments about which there are legitimate differences of opinion in the religious and secular community, to respect the plurality of beliefs and deal with these issues on their own merit and not by attaching them to this legislation.

I trust that we will be able to pass The Civil Rights Restoration Act of 1987 at the earliest possible moment without substantive amendments.

Sincerely,

William Boyd Grove

William Boyd Grove
President

CC: Members
Labor & Human Resources Committee

The United Methodist Building ■ 100 Maryland Avenue, N.E. ■ Washington, D.C. 20002-5664 ■ (202) 488-5600

LUTHERAN OFFICE FOR GOVERNMENTAL AFFAIRS
122 C Street NW, Suite 300
Washington DC 20001-2172
202/ 783-7501
Representing the American Lutheran Church, Association of Evangelical Lutheran Churches and Lutheran Church in America

March 19, 1987

TO: Members of the Senate Labor and Human Resources Committee

As representatives of the religious community we cannot ignore the most important civil rights issue to come before Congress in many years -- the Civil Rights Restoration Act. We urge prompt passage of this measure as introduced.

You are well aware of the 1984 Supreme Court decision, Grove City College v. Bell. In our view this decision dramatically narrowed the coverage of civil rights enforcement under Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. We must not allow this digression to continue unabated. Passage of S.557 will enable us to put a stop to government subsidized discrimination against women, minorities, the elderly and disabled persons.

We have already waited too long to put a halt to the academic institution that says "No" because of a disabling condition. We have waited too long to stop the federally financed school that says "No" because of race or age. We have waited too long to make sure that women are treated fairly and with equity in every department of the University -- not only those receiving direct federal aid. We oppose any attempt to delay this measure by amendment, extended debate, or procedural tactic. The time to act is now.

Recent incidents at Howard Beach and Forsyth County serve as vivid reminders that the long march for civil rights in this nation is not over. We live in an imperfect society which requires protections under the law for all our people, not only a privileged few. The measure we urge you to support forges no new ground but simply seeks to restore those protections to all our citizens regardless of race, sex, age or disabling condition.

Passage of the Civil Rights Restoration Act is a high priority for our respective religious groups. We appeal to you to make it a high priority in your work, as well.

Respectfully yours,

Rev. Charles V. Bergstrom
Executive Director
Lutheran Office for Governmental Affairs

Rev. Dr. Donna T. MortonStout
Associate General Secretary
Issue Development and Advocacy
General Board of Church and Society
United Methodist Church

Rev. George Chauncey
Mary Jane Patterson
Directors, Washington Office
Presbyterian Church (U.S.A.)

Rabbi David Saperstein
Director, Religious Action Center
of Reform Judaism

Rev. William L. Weiler
Director, Washington Office
Episcopal Church

James A. Hamilton
Director, Washington Office
National Council of Churches of Christ

Rev. Jay Lintner
Director, Washington Office
United Church of Christ

Rev. Robert W. Tiller
Director, Office of Governmental Relations
American Baptist Churches, U.S.A.

Marc A. Pearl
Washington Representative
American Jewish Congress

Rev. Leland Wilson
Director, Washington Office
Church of the Brethren

Robert Z. Alpern
Director, Washington Office
Unitarian Universalist Association of
Congregations in North America

Hyman Bookbinder
Special Representative
American Jewish Committee

Edward F. Snyder
Executive Secretary
Friends Committee on National Legislation

Rabbi Joseph Glaser
Executive Vice President
Central Conference of American Rabbis

Dr. Charlotte Hawkins-Sheperd
Director
Episcopal Awareness Center on Handicaps

Dr. John M. Swomley
President
Americans for Religious Liberty

Rabbi Andrew Baker
Washington Area Director
American Jewish Committee

Mary Kercherval Short
Secretary for Women's Concerns
Women's Division
General Board of Global Ministries
United Methodist Church

Sally Timmel
Director, Washington Office
Church Women United

Herbert Blinder
Director, Washington Ethical Action Office
American Ethical Union

Sr. Deborah J. Barrett, SFCC, Esq.
Executive Director
Catholic Women for Reproductive Rights

Rev. Jerry V. Crook III
Director, Task Force on Accessibility
Episcopal Church

Edd Doerr
Vice President
American Humanist Association

Amy Levitin
Vice President for Social Action
Mid-Atlantic Region
North American Federation of Temple Youth

United Synagogue of America

David A. Brody
Director
Washington Office
Anti-Defamation League

Senator **Mikulski**. Senator Kennedy asked me to thank this particular panel and all other participants.

This committee stands adjourned.

[Whereupon, at 1:29 p.m., the committee was adjourned.]

CIVIL RIGHTS RESTORATION ACT OF 1987

WEDNESDAY, APRIL 1, 1987

U.S. Senate,
Committee on Labor and Human Resources,
Washington, DC.

The Committee met, pursuant to notice, at 9:25 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman) presiding.

Present: Senators Kennedy, Hatch, Weicker, Thurmond, Mikulski, and Harkin.

OPENING STATEMENT OF SENATOR KENNEDY

The **Chairman**. We will come to order.

We have got an extremely busy morning ahead of us, not only from our hearing point of view, but we will also recess briefly just before ten o'clock, in order to honor the memory of Senator Zorinsky. There is a very imaginative program in terms of health which involves cholesterol testing, and both because of his interest in that subject and because the Members of the Senate will be gathering briefly over in the Russell Rotunda, we will recess briefly; and then, we have the vote to override the President's veto. We are going to let Senator Hatch chair the hearing during that period of time, so he will not be there to vote to sustain the President's veto. But we will have to work out the best we can——

Senator **Hatch**. That was pretty feeble, Ted, I will tell you. You usually get more laughs than that.

The **Chairman**. It is a little early in the morning for all of us. [Laughter.]

We will try and work out the best we can in terms of continuing the hearing. There will be a number of changes of chairs and Senators coming in and leaving. We wanted to let our witnesses to know that we are very grateful for their presence and thankful for their testimony, and at the outset we want to indicate that the hectic schedule is not out of a lack of respect or interest in their presence here.

The Committee concludes hearings today on the Civil Rights Restoration Act of 1987. The testimony we received at our first hearing on March 19th amply documented the pressing need for a comprehensive reversal of the Supreme Court's unfortunate decision in *Grove City College* v. *Bell.*

The witnesses at our first hearing described the great strides toward equal opportunity that we had made in the years since these civil rights statutes were passed. We have not yet reached our goal, and our progress already is eroding in the wake of the Grove City ruling.

Today we will hear from witnesses wh[illegible]reclosed from pursuing claims of federally funded discrimination because of the narrow reach of these statutes after the Grove City decision. We will also hear from the Administration and representatives of other interested groups.

We intend to move quickly to mark up this legislation and report the bill to the full Senate for prompt action, and I look forward to the testimony this morning.

Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator **Hatch**. Thank you, Senator Kennedy.

Given the expertise and, I might add, the experience of the witnesses this morning, I hope that we can learn more about the legal meaning of several key provisions in this bill.

I do want to compliment Senator Kennedy and others for making a legitimate attempt, I think, a real attempt, to try and resolve some of the issues that we have raised. I do not think we are there yet, but I think with good faith maybe we can resolve some of them and have a bill before the end of this year, and I certainly want to work toward that end.

S. 557 is different from other Grove City bills. It would appear that, as I have said, an effort has been made to address several of the concerns that have been raised by myself and many others concerning this bill.

Just how far these concerns have been addressed, however, remains to be seen. And I hope today that we will begin to learn how we can interpret certain provisions of the bill.

For example, the phrase "and each other entity" found in Section 1(b) of the bill is very significant. It could have profound complicated implications in our society.

Subsection 4, which refers to "any combination comprised of two or more entities described in paragraph 1, 2, or 3" and the exemption provided ultimate beneficiaries in Section 7 of the bill—these too are very critical, very crucial areas that may lead to some real difficulties in the future.

All of us are committed to trying to solve the civil rights problems, but we also have to solve the Government problems and the Constitutional problems as well.

The last hearing made clear that there still is some confusion over what was and what was not covered by the law prior to the Grove City decision. An understanding of the Grove City coverage is critical to me, because it provides the basis for judging whether S. 557 is really just restoring prior law.

One of the witnesses at the first hearing stated quite emphatically that grocery stores receiving foodstamps were not covered under S. 557, yet testimony in years past indicated that these grocery stores were covered. I hope that we can come to some common understanding of who is and who is not covered under the bill. If grocery stores are covered, and "mom and pop" stores are covered, if local pharmacies are covered, if the local farmer is covered—all of which they have made attempts to resolve in this bill—then we have not resolved my problems with the bill. They are serious, significant problems that go far beyond the legitimate civil rights concerns that all of us have.

Now, as I have said earlier, I am fully committed to enforcing Title IX, to overturning the Grove City decision—I do not think there has ever been any question in anybody's mind about that—and I think, to making sure that the civil rights laws are effective.

Passage of the legislation introduced by Senator Dole and myself in 1985 would have eliminated all of these problems arising from the Department of Education's current limited enforcement authority.

I am committed to achieving our common goals in a manner which avoids trammeling other equally important Constitutional rights and liberties that are guaranteed by our Constitution.

I want to compliment the Chairman and others who have filed this bill, who have tried to work to resolve our concerns. They have made some strides, and I am very appreciate of their effort. And, I hope that in good faith, we can work together to resolve all concerns and have a bill before the end of this year that everybody can be proud of, that everybody can be supportive of—a bill that will resolve the civil rights matters, a bill that all of us can feel proud of, a bill that will be easy to interpret, easy to understand, where everybody knows their responsibilities and their liabilities.

I hope we can do that, and Mr. Chairman, I want to thank you for making the efforts to do so.

The CHAIRMAN. Thank you very much, Senator Hatch.

Senator Weicker, do you have any comments?

Senator WEICKER. No, I have no opening comments.

The CHAIRMAN. We welcome this morning the Deputy Assistant Attorney General, Civil Rights Division, Mark Disler. Mr. Disler is testifying in behalf of the Administration.

We want to be courteous to the Administration, but we hope you will respect our time difficulties, too.

Mr. Disler?

STATEMENT OF MARK R. DISLER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. DISLER. Thank you, Mr. Chairman.

The CHAIRMAN. We will turn the timer off at the start today.

Mr. DISLER. Is that it? I had hoped to get a few words in. [Laughter.]

Senator HATCH. That was the way the last hearing was run; I hope it is not the way this one will be run. [Laughter.]

Mr. DISLER. Thank you, Mr. Chairman. I am aware of the time problems. I have a longer statement that I respectfully request be put in the record, and I do have several points I want to make, and I may run a little bit longer than the usual time. I hope I will be able to make them.

The CHAIRMAN. Fine. You are speaking for the Administration, and we will give you what time you need.

Mr. **Disler**. Thank you, Mr. Chairman and Members of the Committee.

I welcome this opportunity to present the Department of Justice's views concerning the legislation addressing the Grove City decision.

Let me note at the outset that the Reagan Administration remains dedicated to the vigorous enforcement of Federal civil rights laws. While I believe that the significant progress in civil rights that has been achieved over the last 25 years is generally acknowledged, more needs to be accomplished, and we certainly must remain ever vigilant at all three levels of Government to assure equal justice under the law.

I know the Committee is well aware of the holdings in Grove City and the four statutes that the decision implicates, so I will not go into that.

I do wish to note, however, that the program-specific ruling in our view broke no new legal ground. The coverage of the Federally-aided program, rather than the entire institution, merely reflected the more persuasive reading of the plain language of Title IX and the three other cross-cutting statutes. Similarly, Title IX's legislative history supports the Supreme Court's program-specific reading of its scope and the weight of case law before Grove City favored the program-specific reading. I have cited in my written statement cases on both sides—I did not cite all of them on both sides, but I cited a sampling of them.

Nonetheless, the Administration believed that there were sound policy reasons for Congressional consideration of a measured and tailored legislative response to the Grove City decision, one that provided for institutional coverage under Title IX and the three other cross-cutting statutes of all educational institutions receiving Federal aid. We support such legislation in this Congress as we did in the last two, and indeed, I understand that Congressmen Sensenbrenner and Stenholm dropped in a bill yesterday that we support, and we will have one up before the Senate shortly.

At the same time, however, we are firmly of the view that an alternative bill, the Civil Rights Restoration Act of 1987, S. 557, is not at all well-suited to address the problems of discrimination today. To be sure, the so-called Restoration Act's expansion of mandatory abortion coverage and its insufficient protection of religious tenets are cause for grave misgivings, in our view, about the proposed legislation.

But no less deeply disturbing, and indeed the one overriding flaw of that bill, is its vague and imprecise language that is calculated to grant sweeping, indeed virtually unfettered Federal authority over a wide range of activities, not because there is a demonstrated need to add in such a sweeping way to the existing fabric of Federal civil rights laws, but on the theory that overly expansive legislation is preferable to a carefully drawn bill.

Make no mistake, in contrast to the Administration-supported measure, S. 557 represents perhaps one of the single greatest legislative expansions of Federal power in the post-World War II era without a showing, in our view, of justification for such a broad expansion. In so doing, in our view, it ignores the principle of federalism; it subjects a large segment of the private sector to new Federal jurisdiction; and it is probably the most direct assault on religious values and religious institutions in the last several years.

We remain strongly opposed to this bill.

That the Grove City decision made no legal change in coverage under these four cross-cutting statutes does not mean that the decision should not be the occasion for consideration anew of the proper scope of these anti-discrimination provisions. It is appropriate to measure what we know today about civil rights enforcement generally and under these laws against Congress' original intention to define their scope programmatically and determine the need, if any, for adjustments.

In our view, there are at least two key factors that we believe Congress ought to bear in mind in considering Grove City legislation.

First, laws such as these that are tied to Federal aid fit into a larger enforcement pattern in the civil rights field; and secondly, the amount of Federal aid giving rise to Federal jurisdiction has skyrocketed since the time of enactment of the first of these statutes in 1964.

With respect to the first point, Mr. Chairman, on the books today are many Federal, State and local civil rights statutes that did not exist 25 years ago along with the few original pioneering civil rights statutes and guarantees. I list some of these necessary laws in my written statement.

With regard to the second point, since 1964, when the first of these program-specific statutes tied to Federal funding was adopted, Congress has enacted many more Federal aid programs, and much more Federal aid is being dispensed by the Federal Government. These Federal aid programs today include, for example, massive block grant programs, vastly increased Medicaid outlays, and much, much more.

Indeed, in fiscal year 1963, just prior to the adoption of the first of these laws, Title VI, the Federal Government administered somewhat more than 190 Federal aid programs, dispensing almost $11 billion to public and private entities. In contrast, by conservative estimate in fiscal year 1985—and it is hard to get a handle on all the money and all the programs, there are so many—by contrast in fiscal year 1985, there were nearly 1,400 programs—a sevenfold increase—dispensing over $200 billion in Federal aid. Thus, program-specific coverage yields broad coverage, but it does so in ways that can be reasonably defined and stops short of subjecting all public and private entities to coverage.

When we expand Federal laws, we expand the costs and burdens that attend those laws, as even a quick look at the Code of Federal Regulations and Federal court decisions demonstrates.

Coverage under these laws, in brief summary, means among other things increased Federal paperwork, random onsite compliance reviews in the absence of an allegation of discrimination, being subject to thousands of words of Federal regulations, and increased exposure to costly private lawsuits and to the judgment of Federal courts.

Consequently, where there is no demonstrated need for the growth of the Federal government, then in our view it ill-serves the

American people to expand so greatly the Federal Government just for the sake of doing so, as seems to be the case under S. 557.

In our view, there is a demonstrated need to provide coverage of educational institutions and all their educational activities, including athletics. Since Grove City, there have been a significant number of instances where serious allegations of discrimination in educational institutions have not been satisfactorily addressed.

In light of this demonstration of current need, we believe that these four statutes should apply to educational and athletic activities of educational institutions whenever the institution receives any Federal aid.

In all other applications of these statutes under the Administration's approach, the scope of the term "program or activity" is neither broadened nor narrowed by the bill and will be interpreted without regard to the Supreme Court's decisions in Grove City and North Haven. We believe this will result in preservation of the programmatic scope of these statutes outside of education institutions.

In addition, Mr. Chairman, we feel that Grove City legislation ought to include abortion-neutral language and strengthened religious tenets language—I address that more fully in my written statement, and I will not take up your time in the oral statement in light of the time constraints.

The Administration bill, then, is a measured and fitting response to the Grove City decision within the overall framework of the Federal civil rights enforcement machinery today, the much vaster outlay of Federal aid giving rise to significant jurisdiction under these statutes, and the actual demonstrated need.

Now, in the three years since Grove City has been decided, agency enforcement activity has in fact remained vigorous. I want to address the Education Department separately in a moment. But I would like to point out that cases get closed under these statutes for a variety of different reasons, and even before Grove City, numbers of cases, complaints, have been closed for lack of timeliness, lack of jurisdiction even before Grove City.

In the year following Grove City, in comparison to fiscal years 1981 and 1983, the percentage of cases closed has actually declined. Now, in our effort to try to determine how much of that is attributable to Grove City, we have tried to collect from agencies correspondence they have had with the Civil Rights Commission, with Members of Congress. We have informally surveyed the agencies recently, the major agencies. I do not want to suggest we have talked to all agencies. And they have reported that Grove City has resulted in virtually no curtailment of their enforcement activity. And I would like to submit for the record some of the correspondence to which I refer. Much of it is from 1985; some of it is from 1987. But as I say, we have talked to a number of the major agencies, and they have indicated, with the exception of Education, that Grove City has had virtually no impact. I will not say there is not a single case outside of Education, but virtually no impact thus far. And as I say, the exception is Education, and our bill addresses that.

Now, I would like to draw particular attention to my next remarks. If there are discrete areas of demonstrated concern outside of education, Mr. Chairman, I think we ought to work together to try to address those.

For example, I would like to give you one example of how, in our view, the S. 557 bill goes much broader than is necessary to address an actual problem and how there was an alternative way that we supported to address that problem.

The claim had been pressed after Grove City that Federal aid to airports brought within the scope of these laws airlines using the airports, even though the airlines had not gotten Federal aid. Further, the argument was made after Grove City that the Federal air traffic controllers constituted Federal aid to commercial aviation, and indeed, some of the leading advocacy groups supporting the Restoration Act in the last Congress pointed to this kind of coverage as what they wanted under a restoration bill, including material they put in the legislative history.

Now, Mr. Chairman, if Federal aid to an airport covers airlines using the airport, then it seems to us that entities using Federally-aided highways and Federally-aided seaports are necessarily covered by analogy.

If Federal air traffic controllers subject all commercial aviation to coverage, then the entities using the National Weather Service would also seem to be covered by analogy. The Department of Justice prevailed in resisting these arguments in the Supreme Court in the *Department of Transportation* v. *PVA* case in 1986, but we also felt that there was a problem for handicapped persons in the airline industry.

Therefore we supported an amendment—I think it was a Dole bill—to an aviation program statute that banned discrimination against handicapped persons in the use of the airlines. We were able to achieve that, working together, without the extremely broad, indeed almost unlimited, ramifications of S. 557.

We also think there is a need to expand coverage for handicapped persons in the housing area, and we have had legislation, Mr. Chairman, up here to do that. We think the better way to do it is through Title VIII.

We also believe that another potential gap in civil rights coverage is discrimination on the basis of handicap in employment, and we are looking at this matter and have been looking at it, and we are considering separate legislation to address this issue.

By contrast—and I am going to come to a conclusion, finally, Mr. Chairman—by contrast, S. 557 in our view portends a vast expansion of Federal jurisdiction over a whole host of public and private entities and activities not covered before Grove City. I listed a number of those in my written statement, and I hope we get a chance to go over some of those. I mentioned the airport and the air traffic controller examples and their analogs, and I just want to conclude with one more quick example.

The S. 557 bill seeks to cover all of the operations of a public school district, a system of vocational education or "other school system". Now, the only thing left to be covered by that phrase are private and religious school systems.

Yet if you take a look at the definition of "education institution" in Title IX at 34 CFR 106.2(j), the definition of "education institution" does not include other school system. It includes public school systems. But you will find conspicuous by its absence the language in S. 557 that seeks to expand coverage to entire private school systems when one school in the system gets aid.

With that, I will conclude and urge support for the Administration-supported measure.

Mr. Chairman, I appreciate your indulgence on the time.

[The prepared statement of Mr. Disler and responses to question submitted by Senators Hatch and Humphrey follow:]

Department of Justice

STATEMENT OF

MARK R. DISLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
CONCERNING GROVE CITY LEGISLATION

WEDNESDAY, APRIL 1, 1987
9:30 a.m.

Mr. Chairman and Members of the Committee, I welcome this opportunity to present the Department of Justice's views concerning legislation addressing the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). Let me note at the outset that the Reagan Administration remains dedicated to the vigorous enforcement of federal civil rights laws. A fair-minded review of the Justice Department's actual civil rights record not only reveals a favorable comparison with the record of its predecessors, but in many respects demonstrates a record of enforcement and achievement exceeding prior efforts.

While I believe that the significant progress in civil rights that has been achieved over the last 25 years is generally acknowledged, more needs to be accomplished. We must be ever vigilant at all three levels of government to assure equal justice under the law.

The Grove City case involves one of four cross-cutting civil rights statutes, Title IX of the Education Amendments of 1972. Title IX forbids sex discrimination in education programs or activities receiving Federal financial assistance. The decision also affects the scope of three other similarly worded statutes forbidding discrimination in all programs or activities receiving Federal financial assistance: Title VI of the Civil Rights Act of 1964 (race, color, national origin); Section 504 of the Rehabilitation Act of 1973 (handicap); and the Age Discrimination Act of 1975 (age).

In Grove City, the Supreme Court decided that federal education aid to a student constitutes Federal financial assistance to the college, even though the college received no direct federal aid. The Court also ruled that because the student grants funded only the college's student aid program, it was that "program or activity", not the entire educational institution itself, that was covered by the antidiscrimination provision.

The second ruling, the program-specific ruling, broke no new legal ground. The coverage of the federally-aided program rather than the entire institution merely reflected the more persuasive reading of the plain language of Title IX (and the other three cross-cutting statutes). 1/ Similarly, Title IX's legislative history supports the Supreme Court's program-specific reading of its scope. And, the weight of caselaw before Grove City favored the program-specific reading. 2/ Nonetheless,

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1/ The Department of Education had not been adhering to this programmatic limitation prior to 1984.

2/ Compare, e.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) (Federal scholarship and loan aid to a college subjects only the college's student aid program to Title IX coverage), vacated and remanded in light of Grove City College v. Bell, 466 U.S. 901 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982) (reaffirming earlier decision holding that Title IX is program-specific); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (assistance provided to the Harvard Law School financial aid program, apparently through a college work-study program, does not constitute assistance to the entire law school educational program: Title IX complaint

(FOOTNOTE CONTINUED)

the Administration believed that there were sound policy reasons for congressional consideration of a measured and tailored legislative response to the *Grove City* decision, one that provided for institutional coverage under Title IX and the other three cross-cutting statutes of all educational institutions receiving Federal financial assistance. We support such legislation in the 100th Congress as we did in the last two Congresses.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

must allege discrimination in the particular assisted program within the institution), *cert. denied*, 456 U.S. 928 (1982); Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) ("on the basis of the language of Section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under Section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefitted by federal financial assistance") (footnotes omitted); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (Federal aid to a company's work training program subjects only that program, not the entire company, to Section 504 coverage); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983) (Federal aid to conduct seminars on alcohol abuse does not bring the society's activity of certifying medical technologists within Section 504 coverage); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (University's intercollegiate athletic program not subject to Title IX coverage because it did not receive Federal financial assistance), *with e.g.*, Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982) (Title IX); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980) (Section 504); Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Title VI).

At the same time, we are firmly of the view that an alternative bill, the Civil Rights Restoration Act of 1987, S. 557, is not at all well-suited to address the problem of discrimination today. To be sure, the Restoration Act's expansion of mandatory abortion coverage, and its insufficient protection of religious tenets, are cause for grave misgivings about the proposed legislation. But no less deeply disturbing, and indeed the one overriding flaw of that bill, is its vague and imprecise language that is calculated to grant sweeping, indeed virtually unfettered, federal authority over a wide range of activities, not because there is a demonstrated need to add in such a sweeping way to the existing fabric of federal civil rights laws, but on the theory that overly expansive legislation, even though duplicative in many respects, is preferable to a carefully drawn bill.

Make no mistake, in contrast to the Administration-supported measure, S. 557 represents perhaps one of the single greatest legislative expansions of federal power in the post-World War II era without a showing of justification for such expansion. In so doing, it ignores the principle of federalism; it subjects large segments of the private sector to unprecedented federal jurisdiction; and it is probably the most direct assault on religious values and religious institutions in recent times.

We remain strongly opposed to this bill.

Overall Framework In Which These Four Laws Operate

That the Grove City decision made no legal change in coverage under these four cross-cutting civil rights statutes does not mean that the decision should not be the occasion for consideration anew of the proper scope of these anti-discrimination provisions. It is appropriate to measure what we know today about civil rights enforcement generally, and under these laws, against Congress's original intention to define their scope programmatically and determine the need, if any, for adjustments.

In making this determination, we should bear in mind that we need a sense of perspective whenever we examine the precise role of a particular federal enforcement scheme, including a particular federal civil rights enforcement scheme. We need to recognize that laws such as these that are tied to federal aid fit into a larger enforcement pattern in the civil rights field.

On the books today are many statutes that didn't exist twenty-five years ago, along with the few original, pioneering civil rights statutes. For example, Title II of the Civil Rights Act of 1964 forbids discrimination in public accommodations. Title IV of that Act authorizes the United States to bring a school discrimination case where private parties are unable to do so. Title VII forbids discrimination in employment. The Fair Housing Act of 1968 forbids discrimination in housing. The Age Discrimination in Employment Act of 1967 forbids discrimination on the basis of age in employment. Section 503 of the Rehabilitation Act of 1973 requires affirmative action in employment by federal contractors for handicapped persons. Executive Order 11246 forbids discrimination by federal contractors on the basis of race, color, national origin, sex or religion. The Voting Rights Act of 1965 prohibits discrimination in the exercise of the franchise. Other federal protections exist. Sections 1981 and 1983 of Title 42 of the United States Code provide, in part, that all persons in the United States have the same rights as whites to make and enforce contracts, and that civil rights violations that occur under color of state law are prohibited under federal law. The Fifth Amendment and its Due Process Clause require the federal government to treat citizens equally under the law. The Fourteenth Amendment compels state governments and local governments to adhere to the principle of equal protection of the laws.

Thus, when we view these four necessary "cross-cutting" civil rights statutes in relation to that overall, necessary federal enforcement scheme -- and I haven't even mentioned state and local statutes which have proliferated in the last 25 years -- we must see their proper scope not in the imaginary vacuum that some of the proponents of the extremely expansive Grove City bill would suggest, but in the overall scheme of civil rights enforcement in this country.

Further, since 1964 when the first of these program-specific statutes tied to federal funding was adopted, Congress has enacted many more federal aid programs and much more federal aid is being dispensed by the federal government.

The medicaid program, for example, results in coverage of its funded activities. Thus, "program-specific" coverage yields broad coverage, but it does so in ways that can be reasonably defined and stops short of subjecting all public and private entities to coverage.

Costs of Unnecessary Government

When we expand federal laws, we expand the costs and burdens that attend those laws, as even a quick look at the Code of Federal Regulations demonstrates. When we trench on the "operating room" of states and localities and the private sector, we pay a price which can only be justified by a compelling public purpose and a demonstrated need. Justice Lewis Powell, joined by Chief Justice Burger and Justice O'Connor, aptly remarked upon this general concern in this very same Grove City case, even as they concurred in the result. Justice Powell described Grove City College as "an independent, coeducational liberal arts college. It describes itself as having 'both a Christian world view and a freedom philosophy,' perceiving these as 'interrelated'. . . . Apart from [the indirect assistance from enrolling students who themselves receive federal education aid], Grove City has followed an unbending policy of refusing all forms of government assistance, whether federal, state or local.

It was and is the policy of this small college to remain wholly independent of government assistance, *recognizing -- as this case well illustrates -- that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished*." *Grove City College* v. *Bell*, 465 U.S. 555, 576-77 (1984). (Emphasis supplied).

What does coverage under these laws mean? In summary, it would mean increased federal paperwork requirements; random on-site compliance reviews by federal agencies even in the absence of an allegation of discrimination; being subject to thousands of words of federal regulations; and increased exposure to costly private lawsuits and to the judgment of federal courts.

Consequently, where there is no demonstrated, compelling need for the growth of the federal government, it ill serves the American people to expand so greatly the federal government, just for the sake of doing so, as would be the case under S. 557. In the case of civil rights statutes, the question to be addressed is what problems remain -- what additional legislative action needs to be undertaken in light of the range of federal, state, and local laws now on the books, and the vast outlay of federal aid that gives vitality to these four cross-cutting statutes.

In our view, there is a demonstrated need to provide coverage of educational institutions in all of their educational activities, including athletic activities.

Since Grove City, there have been a significant number of instances where serious allegations of discrimination in educational institutions have not been satisfactorily addressed. With this demonstration of legitimate, current need, we believe that these four statutes should apply to educational and athletic activities of educational institutions whenever the institution receives any federal financial assistance. 3/ Thus, if federal

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3/ Some persons have argued that the Administration's proposal could codify, rather than overturn the Grove City decision. This argument derives from the definition of "education institution" currently found in Title IX. Under this definition, "administratively separate units" of a college or university can each be considered to be an "education institution." Thus it has been argued that the "administratively separate" language is ambiguous and could be construed to mean that internal departments of a school -- such as a student financial aid office -- should each be treated as a separate "education institution" under the bill.

Departmental regulations implementing Title IX, however, have always interpreted this "administratively separate" language as referring to a school, college, or department of an education institution, admission to which is independent of any other component of the institution. See, 34 C.F.R. § 106.2. Thus, under this definition, some professional and graduate schools may be considered "administratively separate units," and treated as separate "education institutions" (because they have admissions practices and procedures which are wholly independent of the admissions standards, practices, and procedures for other components of the university). However, it is our understanding of this definition that all undergraduate programs -- including athletics -- have always been treated as a single education institution under prior Department of Education practice and thus would be covered in their entirety under the bill.

This treatment of graduate and professional schools with independent admission standards as "administratively separate" is consistent with what is understood to have been agency enforcement practice prior to Grove City.

aid is given to any of a college's educational or athletic programs or activities, then all of that college's educational and athletic programs and activities will be subject to the four statutes. Moreover, under the legislation we support, a public elementary and secondary school system would be covered in its entirety if any school in the system received federal education aid. 34 C.F.R. 106.2(j) (defining "educational institution").

In all other applications of these statutes under the Administration's approach, the scope of the term "program or activity" is neither broadened nor narrowed by the bill and will be interpreted without regard to the Supreme Court's decisions in Grove City and North Haven Board of Education v. Bell (1982). 4/

In addition, in our view, legislation addressing the Grove City decision should provide for the abortion-neutral language of the Administration-supported measure. This language would ensure that no recipient of federal aid is either required to provide or pay for abortions or abortion-related services or precluded from doing so. This amendment is necessary so as to dispel any suggestion that the proposed legislation either directly or indirectly leaves in place current Title IX regulations that require an institution to treat abortion like any

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4/ In North Haven Board of Education v. Bell, 456 U.S. 512 (1982), the Supreme Court held, consistent with the Administration's position, that employees, as well as students, are protected by Title IX where Title IX coverage exists. At the same time, the Court noted the programmatic reach of Title IX.

other temporary disability "for all job-related purposes, including . . . payment of disability income . . . and under any fringe benefit offered to employees. . . ." 5/ 34 C.F.R. §106.57(c) (emphasis supplied). See also 34 C.F.R. §106.40(b)(4). 6/

Indeed, the regulations actually require discrimination in favor of abortion: an institution must provide leave for an abortion for both students and employees even when it "does not maintain a leave policy for its students [or employees, and when] a student [or employee] . . . does not otherwise qualify for leave under" the institution's leave policy. 34 C.F.R. 106.40(b)(5). See also 34 C.F.R. §106.57(d).

The abortion-neutral language was sponsored by Congressmen Tom Tauke and F. James Sensenbrenner, Jr. in the 99th Congress. It was adopted by the House Education and Labor Committee in May, 1985 during consideration of a Grove City bill.

5/ This abortion-neutral language is clearly consistent with the original meaning of Title IX when enacted. In 1972, when Title IX was adopted, abortion was illegal in virtually all states. Roe v. Wade, 410 U.S. 113 (1973), nullifying such laws, was decided by the Supreme Court in the following year. The Title IX regulations became final in 1975. Thus, the pro-abortion elements of the regulations appear to look to the Roe decision -- decided after Title IX's enactment -- rather than to Title IX itself. There is virtually no reason to believe that Congress intended Title IX to overturn state bans on abortion, let alone to mandate abortion coverage by institutions receiving federal aid.

6/ This regulation provides that an institution must treat abortion like any other temporary disability "with respect to any medical or hospital benefit, service, plan, or policy" for its students.

Further, in our view, Grove City legislation should address the issue of religious liberty. The religious tenets language in Title IX, included in the Administration-supported measure, protects an educational institution's policy which is based upon the tenets of a religious organization where the institution is controlled by, or closely identifies with the tenets of, the religious organization.

In 1972, when Congress enacted Title IX, Congress created several exceptions to its coverage, including: "This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization. . . ." 20 U.S.C. §1681(a)(3).

At that time, many religious institutions were controlled outright by religious entities. Some of these institutions today are controlled by lay boards and thus outside the scope of the exception. Yet, they retain their close identification with the religious tenets of religious organizations. Thus, language has been added to the Administration-supported bill in order to protect a policy of such institutions based on religious tenets.

An institution cannot claim protection under this language with respect to Title VI, Section 504, or the Age Discrimination Act. The exception exists only under Title IX. 7/ The exception

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7/ A covered institution is not exempt in its entirety from Title IX if just one of its policies is based on religious tenets and conflicts with Title IX. The exception applies only to the specific policy or policies, based on religious tenets of those institutions able to avail themselves of the exception, when Title IX would conflict with such policy or policies.

recognizes that the tenets of some religious organizations differentiate in some ways between the sexes. In the spirit of diversity and pluralism in private education, the exception respects the independence of an institution's conduct in carefully delineated circumstances when the institution is controlled by, or closely identified with the religious tenets of, a religious organization. 8/

In May, 1985, in response to concerns about this issue, the House Education and Labor Committee first strengthened the current religious tenets exception when considering Grove City legislation. This particular language in the Administration-supported bill is modeled on language in the Higher Education Amendments of 1986, adopted by Congress and signed into law in October, 1986. There, a prohibition against religious discrimination in the construction loan program was enacted with an exception using the same language appearing in this bill. This bill's provision, in short, is modeled on language used by the 99th Congress just a few months ago. Indeed, I understand it emerged in a Conference in which this Committee participated.

8/ This exception will have no application in public schools. The First Amendment, as applied to states and localities, effectively prohibits public schools from basing any policies or conduct squarely on the religious tenets of a religious organization. This exception applies only to private institutions -- where students are in attendance because they have freely chosen to attend the institution.

The Administration-supported proposal, then, is a measured and fitting response to the Grove City decision within the overall framework of the total federal civil rights enforcement machinery today, the much vaster outlay of federal aid giving rise to significant jurisdiction under these statutes, and the actual demonstrated need.

If there are areas of demonstrated concern outside of education, then let us work together to address them. For example, the claim has been pressed, even after Grove City, that federal aid to airports brings within the scope of these laws airlines using the airports, even though the airlines received no federal aid. Further, the argument was made after Grove City that the federal air traffic controllers subjected to coverage commercial aviation using the controllers. Of course, if federal aid to an airport covers airlines using the airport, then entities using federally aided highways and seaports are necessarily covered by analogy. If federal air traffic controllers subject to coverage all commercial aviation, then entities using the National Weather Service would also be covered by analogy. The Department of Justice prevailed in resisting these arguments in the Supreme Court. United States Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986). We also felt, however, that a problem for handicapped persons did exist in the airline industry. Therefore, the Administration supported an amendment to an aviation program statute that banned discrimination against handicapped persons by airlines -- without the extremely broad ramifications of S. 557.

By contrast, S. 557 portends a vast expansion of federal jurisdiction over a whole host of public and private activities not covered before Grove City.

Without being exhaustive, some examples are:

- Grocery stores and supermarkets participating in the Food Stamp Program will be subject to coverage solely by virtue of their participation in that program. 9/
- Every school in a religious school system will be covered in its entirety if any one school within the school system receives even one dollar of federal financial assistance.
- An entire church or synagogue will be covered under Title VI, Section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under Title IX if the federally-assisted program or activity is educational (with exceptions under Title IX in those circumstances where Title IX requirements conflict with religious tenets).
- Every division, plant, and subsidiary of a corporation principally engaged in the business of providing education, health care, housing, social services, or parks and recreation will be

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9/ This coverage did not exist before Grove City. Statement by Daniel Oliver, General Counsel, Department of Agriculture, to Senator Jesse Helms, July 1984.

covered in its entirety whenever one portion of one plant receives any federal financial assistance. 10/

- The entire plant or separate facility of all other corporations would be covered if one portion of, or one program at, the plant or facility receives any federal financial assistance. 11/
- A state, county, or local government department or agency will be covered in its entirety, whenever one of its programs receives federal aid. Thus, if a state health clinic is built with federal funds in San Diego, California, not only is the clinic covered, but all activities of the state's health department in all parts of the state are also covered.
- Farmers receiving crop subsidies and price supports will be subject to coverage. 12/
- Airlines, businesses using their own aircraft in their business activity, and commercial aviation generally will be covered if they use federally-assisted airports or the air traffic controller system.
- Entities using federally-assisted highways and seaports will be covered.
- Entities using the National Weather Service will be covered.

10/ Coverage in the private sector was program-specific before Grove City. Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983); *see* Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981).

11/ See footnote 10.

12/ Such coverage did not exist before Grove City. 110 Cong. Rec. 6545 (Sen. Humphrey) (March 30, 1964).

- A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any federal financial assistance.

- Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives federal financial assistance. 13/

- The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to these other than students or faculty, will be covered if the institution receives even one dollar of federal education assistance. 14/

- A school, college, or unversity investment policy and management of endowment will be covered if the institution receives even one dollar of federal education assistance. 15/

- A new, vague catch-all provison would provide additional coverage in uncertain ways.

The Administration-supported measure is a reasonable alternative. We urge its adoption.

13/ Such coverage did not exist before Grove City. Testimony of T.H. Bell, Civil Rights Act of 1984: Hearings on S. 2568, before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Congress, 2d Sess., 227-228 (June 5, 1984).

14/ Such coverage did not exist before Grove City. Testimony of Harry M. Singleton, Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Congress, 1st Sess., 299-300 (March 7, 1985).

15/ See footnote 14.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 28 1987

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

This responds to your letter of April 10, 1987. I attach herewith answers to all of Senator Humphrey's questions as well as questions 2 through 9 from Senator Hatch. I will have answers to Senator Hatch's other two questions very shortly.

I also enclose herewith the document, Enforcing The Law, to which I referred in my testimony so that it may be inserted into the record of the hearing of April 1, 1987.

Thank you very much for holding the record open for these materials and the answers I will supply to the remaining two questions.

Sincerely,

Mark R. Disler

Mark R. Disler
Deputy Assistant Attorney General
Civil Rights Division

Enclosures

Responses to Questions Submitted by Senator Gordon J. Humphrey

QUESTION 1: Is it the Department's view that this bill goes far beyond restoration of the law as it was before the Grove City decision and instead expands its coverage considerably?

ANSWER 1: It is the Department of Justice's view that S. 557 goes far beyond restoration of the pre-Grove City scope of the statutes amended by the bill. Indeed, S. 557 expands considerably the scope of federal jurisdiction under these four statutes.

QUESTION 2: For example, I take it that if a single school in an incorporated diocesan school system had a federally-assisted lunch program, or received some other form of federal assistance, then all the schools and programs in that school system could be subject to all the compliance reports, the inspections, and the record-keeping requirements required by these 4 regulatory statutes?

ANSWER 2: Yes. If a single school in diocesan school system receives federal financial assistance for a program at the school, all of the other schools in that dioceasan school system will be covered in their entirety under these four statutes and all of the regulatory requirements promulgated pursuant to these statutes. */ This coverage flows from Section 2(B) of the operative provisions of S. 557, covering "all of the operations of -- . . . a local educational agency (as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system . . . any part of which is extended federal financial assistance. . . ." (Emphasis supplied). The local educational agency described in this provision is a public school district. The only "other school system" that can be referenced by this provision is a private school system, including a religious school system. Yet, the definition section of the Department of Education's Title IX regulations does not include the phrase "other school system". 34 C.F.R. 106.2(j). It is one of the striking examples of the expansion of this bill well beyond the law as it existed before the Grove City decision.

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*/ Title IX contains a narrow exception wherein its requirements "shall not apply to an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization. . . ." 20 U.S.C. § 1681(a)(3).

QUESTION 3: Is it your view that grocery stores and supermarkets which serve customers using food stamps are subject to novel and substantial federal regulatory burdens under this bill?

Could you identify some of the specific regulatory burdens which are involved under the 4 statutes which would have much broader coverage under this bill?

ANSWER 3. If S. 557 is enacted, grocery stores or supermarkets serving customers using food stamps will be subject to coverage for the first time under at least three of these four cross-cutting statutes. They will thus be subject to the regulatory burdens thereunder. Among these regulatory requirements include those promulgated pursuant to Section 504. For example:

> Department of Agriculture Section 504 regulations cover all entities deemed recipients, even ones with less than 15 employees. These regulations, however, provide for slightly reduced compliance burdens in just a few areas for a recipient with less than 15 employees. Therefore, if the Civil Rights Restoration Act is enacted, all grocers, including small ones, will have to comply with all but a few of the Department of Agriculture's extensive Section 504 regulations. Among the regulations applicable even to the smallest grocery store are:
>
> - paperwork and notice requirements;
> - a requirement to consult with disabled persons or disability rights groups and to make a record of such consultations;
> - extensive employment regulations;
> - regulations applicable to new construction or alteration of an existing building;
> - a requirement to "take appropriate steps" to guarantee that communications with hearing-impaired and vision-impaired applicants, employees, and customers can be understood;

- a requirement to undertake home deliveries or install wheelchair ramps.

Moreover, grocers with 15 or more employees -- which includes numerous small businesses -- have added burdens under the regulations such as:

- the requirement of adopting "grievance procedures that incorporate appropriate due process standards";
- the requirement of providing auxiliary aids for hearing-impaired and vision-impaired persons if necessary for them to work or shop at the store.

QUESTION 4: How much evidence is there -- if any -- that grocery stores, supermarkets, and pharmacies are engaged in widespread discrimination such as to justify imposition of substantial new regulatory burdens on them?

ANSWER 4. I have seen no evidence, nor do I believe any evidence has been submitted during three years of testimony on Grove City legislation, that grocery stores, supermarkets, and pharmacies are engaging in discrimination, let alone widespread discrimination, or discrimination that would justify the imposition of these new burdens.

QUESTION 5: The proponents of S. 557 have cited the volume of Title IX discrimination complaints which have been dismissed subsequent to the Grove City ruling as one of the justifications for this legislation. But I understand that between 550 and 700 of the Title IX complaints dismissed by the Dept. of Education during this period were crank complaints filed by a single individual.

A. Are you aware of this report? Could you undertake to provide me with the details?

B. In light of this report, does the Justice Department or the Dept. of Education have an estimate of what percentage of all these Title IX complaints as compared to frivolous or groundless complaints?

C. Many of the claims of discrimination supposedly affected and foreclosed by the Grove City decision can be asserted and remedied under other federal and state civil rights laws, such as 42 U.S.C. Sec. 1983, Title VII, The Age Discrimination in Employment Act, and others. In light of the sweeping claims about the drastic impact of Grove City, has anyone conducted a reliable study to establish what portion of the claims in question can be adequately remedied under the many civil rights laws that were in on way affected or limited by the Grove City ruling?

D. I would appreciate the Department's comments on the broad variety of claims supposedly foreclosed by the Grove City decision which could actually be pursued in litigation or otherwise under other federal, state, or local antidiscrimination statutes.

ANSWER 5 (A) and (B): I am attaching a March 31, 1987, statement by Secretary of Education William J. Bennett which addresses these questions. Attachment 1.

ANSWER 5 (C) and (D): Many claims of discrimination can be reached today by the broad mosaic of federal, state, and local anti-discrimination laws which has developed in the last 25 years. For example, Title II of the Civil Rights Act of 1964 forbids discrimination in public accommodations. Title IV of that Act authorizes the United States to bring a school discrimination case where private parties are unable to do so. Title VII forbids discrimination in employment. The Fair Housing Act of 1968 forbids discrimination in housing. The Age Discrimination in Employment Act of 1967 forbids discrimination on the basis of age in employment. Section 503 of the Rehabilitation Act of 1973 requires affirmative action in employment by federal contractors for handicapped persons. Executive Order 11246 forbids discrimination by federal contractors on the basis of race, color, national origin, sex or religion. The Voting Rights Act of 1965 prohibits discrimination in the exercise of the franchise. Other federal protections exist. Sections 1981 and 1983 of Title 42 of the United States Code provide, in part, that all persons in the United States have the same rights as whites to make and enforce contracts, and that civil rights violations that occur under color of state law are prohibited under federal law. The Fifth Amendment and its Due Process Clause require the federal government to treat citizens equally under the law. The Fourteenth Amendment compels state governments and local governments to adhere to the principle of equal protection of the laws. There are numerous state and local prohibitions against discrimination.

I should also note that the amount of federal aid that is being dispensed by the federal government giving rise to jurisdiction under these four cross-cutting civil rights statutes themselves has skyrocketed since F.Y. 1963 from just under $11 billion to over $200 billion, by conservative estimate. This in turn, results in generous coverage under these four cross-cutting civil rights statutes today.

QUESTION 6: I have questions about the provision of the bill set forth under the Rehabilitation Act part in Sec. 4(C), which says:

"Small providers are not required . . . to make significant structural alterations to their existing facilities for the purpose of assuming program accessibility, if alternative means of providing the services are available."

A. First, what is meant by the term "small providers"?

B. Wouldn't a grocery store that takes federal food stamps be a "small provider", or a pharmacy that dispenses prescriptions to Medicare users?

C. Isn't it clear that this term needs to be specifically defined?

D. Does anyone have any idea where the line is drawn as to what constitutes "significant" structural alterations? Do you foresee a problem for small businesses and small institutions, etc., having great difficulty in understanding what their obligations are under this hopelessly imprecise language?

E. And doesn't this language mean that, say, a supermarket or pharmacy that doesn't qualify as a small provider -- whatever that is -- is required to make "significant structural alternations" for program accessibility once it is covered by Sec. 504 as a result of this bill?

ANSWER 6: Some federal agency regulations contain an exception to some of the most onerous Section 504 regulatory requirements for recipients which have 15 or less employees, e.g., 45 C.F.R. § 84.22(c) (Department of Health and Human Services); 15 C.F.R. § 8b.17(c) (Department of Commerce) although not all such regulations do contain this exception, e.g., 40 C.F.R. § 7.65 (Environmental Protection Agency).

It appears that this provision of S. 557 has reference to the former regulatory provisions. By including this substantive provision, it appears that the proponents of S. 557 have opened the bill up to substantive amendments and not merely amendments addressing scope.

If a grocery store has less than 15 employees it would be deemed a small provider. 7 C.F.R. § 15b.18(c) (regulation of the Department of Agriculture). But, the Act would only exempt such a small provider from making significant structural alterations to existing facilities and only if there is an alternative means of providing the services. Indeed, while some claim a small provider could thus avoid the need to make significant structural alterations by making home deliveries, home delivery service itself may be a significant burden on a small business.

Moreover, this small provider would still be subject to all of the other requirements under Section 504, some of which are listed in my answer to Question 3, as well as all the other requirements under at least two of the other three statutes. Indeed, a business with 15 employees is not necessarily a "big" business and yet it would have to comply with all of these burdens.

It is desirable that this term be specifically defined because it references current regulations, yet not all current regulations have an exception for small providers.

Although the term "significant" structural alterations may not be clear on its face, particularly to small businesses and to those who will be subject to Section 504 for the first time under S. 557, there is a body of regulatory experience that would assist in determining what is "significant".

A supermaket or pharmacy -- or any other entity -- covered by Section 504, if it does not fit within the "small provider" exception, would have to make "significant structural alterations" for program accessibility if there is no other way of providing access to its goods and services.

QUESTION 7: With respect to the abortion issue, assume that there is a covered school which elects to provide abortion coverage in its programs even if an abortion-neutral provision (such as Tauke-Sensenbrenner) is adopted. Would the Department support language that would require such a school to rebate that portion of student activity fees allocated to cover health costs attributable to abortion coverage?

ANSWER 7: If abortion-neutral language is adopted, and a school voluntarily elects to provide abortion coverage in its insurance programs or otherwise, and those programs are funded from student activity or other fees, the Department of Justice would not oppose language in Grove City legislation that would require a school to rebate that portion of the student fees that pays for abortions or abortion coverage to students requesting such a rebate.

QUESTION 8: The Supreme Court's recent decision in the Arline case held that persons with contagious diseases such as tuberculosis constitute "handicapped individuals" for purposes of Sec. 504 of the Rehabilitation Act.

A. Do you agree that this holding could be applied to AIDS-infected persons as well?

B. If that's the case, then doesn't the Arline ruling become significant in terms of the effect of this bill? In short, won't it mean that the thousands of programs and institutions covered by Sec. 504 as a result of this bill could be violating the law if they deny anyone a job, or full participation in any of their programs and services, because that person has AIDS or any other contagious disease?

C. For example, if a school's entire operations are made subject to Sec. 504 due to this bill, then wouldn't it become illegal for the school to exclude such persons with contagious diseases from such sensitive areas as cafeteria work, food preparation, medical or dental clinical work, or nursing?

ANSWER 8: It is quite clear that under the Supreme Court's decision in Arline, Section 504 protects handicapped persons from discrimination because of their infectiousness. This includes not only a person with infectious tuberculosis, but a person with AIDS as well.

The Arline ruling is significant in terms of its effect on S. 557. To the extent that Section 504's coverage is expanded beyond current law, covered entities will be required to seek accommodation of handicapped persons who have infectious diseases. This will, in my view, have a significant impact on recipients under S. 557: many covered entities, when faced with a claim of an infectious person that he or she is protected and will file administrative complaints or litigation under Section 504, will choose not to "fight city hall" and will acquiesce in the demands of such an infectious person, even though there may be risks to other participants in the recipient's activities. If [illegible] from infection, it will first have to seek to accommodate the infectious person if the person is otherwise qualified to participate in the program or perform the job.

Thus, for example, covered educational institutions may be faced with the question whether a person with infectious tuberculosis, while perhaps not being qualified to teach grade school children because such young children are particularly susceptible to the infection, ought to be accommodated by being permitted to teach high school children who are older and less susceptible to infection or to be an administrator and work with adults who are even less susceptible to infection.

Whether it will be illegal under Section 504 for a covered school to exclude persons with contagious diseases is now a matter that Federal agencies and judges will be deciding.

ATTACHMENT #1

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

STATEMENT BY SECRETARY OF EDUCATION
WILLIAM J. BENNETT
MARCH 31, 1987

The Supreme Court's 1984 Grove City decision held that an entire educational institution was not subject to civil rights laws when only one program at the institution received Federal aid.

The Grove City decision makes it more difficult for the Department of Education to enforce the civil rights laws.

Today I urge the Congress to act favorably on the bill being introduced by Congressmen F. James Sensenbrenner, Jr. (R-Wis.) and Charles Stenholm (D-Tex.) so that we can remove this jurisdictional impediment in the field of education. There is no need for Congress to get bogged down in making new law that would extend the Department's enforcement far beyond the field of education. What we do need is a return to pre-Grove City enforcement practices.

Before the Grove City decision, the Office for Civil Rights (OCR) investigated all of the educational programs of an institution if any part of the institution received Federal aid, even when a complaint was filed about an activity that did not itself receive Federal aid.

-MORE-

The Office for Civil Rights reports that it has closed or narrowed 834 complaints and compliance reviews -- out of over 7,500 received or initiated in the last three fiscal years -- due to the Grove City decision: 674 complaints were closed in whole or in part for lack of jurisdiction due to the Grove City decision; 160 compliance reviews were discontinued or limited.

Of the complaints that were closed, 468 were from a single individual who, during Fiscal Years 1985 and 1986, filed 688 complaints. Leaving aside this single complainant's closures, OCR closed -- for lack of jurisdiction due to Grove City -- 206 complaints out of 6,111 received in the last three years. These cases would not have been closed for lack of jurisdiction due to Grove City had the Administration's legislation in this area been enacted in 1984.

I urge Congress to help us enforce the civil rights laws more effectively by acting swiftly to pass this important piece of legislation, so that no more cases need be closed due to Grove City.

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Senator Hatch's

Questions for Mr. Dissler

1. On page 15 through 17 of your prepared statement, you list a variety of entities which you believe would be covered under the language of S. 557. Would you explain whether these entities were covered prior to the Grove City decision and how you feel they would be covered under S. 557?

2. Do you feel that S. 557 simply addresses the scope of federal regulatory authority of the four statutes covered by the bill? If not, please show where the legisltion may be substantive in nature?

3. If a state government receives federal funds which are in turn distributed to various state agencies, would these state agencies be covered under the definition of progam or activity, in paragraphs (1)(A) and (B) as found, for example, on page 8, of S. 557? If your answer is yes, please explain how they are covered.

4. Continuing with the example mentioned in the previous question, if the state agencies awarded state contracts or grants with these federal funds, would the recipients of such funds be covered under the portion of paragraph (1)(B) which refers to "(and each other entity) to which the assistance is extended"? If your answer is yes, please explain how they are covered. Would they be covered by some other provision in the bill?

5. Again, continuing with the example mentioned above, if the recipients of federal funds awarded to the state agency use those funds to purchase goods or services, would the providers of such goods or services be an entity subject to federal regulation under the definition of program or activity found in S. 557? If your answer is yes, please explain how they would be covered.

6. Would an entire church, such as the Catholic Church, be a "combination" as the word is used in section 4 if two or more parishes are recipients of federal financial assistance?

7. Would subsection 4 require coverage of an entire state government if two or more agency offices or divisions of that government received assistance?

8. Please explain who you believe is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

9. In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S.557 excluded from coverage under the four statutes addressed in legislation?

10. Do you believe that there are contradictions among witnesses concerning the scope of coverage prior to the Grove City decision. If so, would you please explain where such contradictions exist and what you believe to be the correct interpretation in those areas?

Responses to Questions Submitted by Senator Orrin G. Hatch

QUESTION 2: Do you feel that S. 557 simply addresses the scope of federal regulatory authority of the four statutes covered by the bill? If not, please show where the legislation may be substantive in nature?

ANSWER 2: S. 557 does not simply address the scope of federal regulatory authority of the four statutes covered by it. First, the bill contains a finding, in Section 2(2) that "legislative action is necessary to restore the prior consistent and longstanding Executive Branch interpretation and broad, institution-wide application of those laws as previously administered." (Emphasis supplied). By referencing so-called "longstanding Executive Branch interpretation" as well as referencing so-called "broad, institution-wide application" of the laws amended by S. 557, the bill clearly expresses an intention of codifying substantive agency interpretations under these four statutes.

Moreover, Section 4(c) of the bill provides: "Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection."

This is obviously a substantive provision. It codifies certain regulations regarding the substantive meaning of Section 504 of the Rehabilitation Act of 1973. Indeed, the regulations of some, but not all, federal agencies which implement Section 504's application to federally-assisted programs contain a "small provider" provision. This part of S. 557 is clearly intended to address the substance and not the mere scope of Section 504.

It is clear that the proponents of S. 557 have opened up the substance of these four cross-cutting civil rights laws by the terms of their bill.

QUESTION 3: If a state government receives federal funds which are in turn distributed to various state agencies, would these state agencies be covered under the definition of program or activity, in paragraphs (1)(A) and (B) as found, for example, on page 8, of S. 557? If your answer is yes, please explain how they are covered.

ANSWER 3: If a state government receives federal funds which are in turn distributed to various state agencies, those state agencies would be covered in their entirety under the definition of program or activity contained in paragraphs (1)(A) and (B) of the operative provisions of S. 557. This follows from the plain langauge of these provisions which cover "all of the operations of" any state agency, "any part of which is extended federal financial assistance" either directly from the federal government or through another "entity" of state government.

Prior to Grove City, the particular program or activity of a state agency receiving federal financial assistance would have been the only part of the agency covered.

QUESTION 4: Continuing with the example mentioned in the previous question, if the state agencies awarded state contracts or grants with these federal funds, would the recipients of such funds be covered under the portion of paragraph (1)(B) which refers to "(and each other entity) to which the assistance is extended"? If your answer is yes, please explain how they are covered. Would they be covered by some other provision in the bill?

ANSWER 4: If state agencies themselves awarded state contracts or grants with these federal funds, the recipients of those funds would be covered in their entirety under the language of (1)(B) which covers "all of the operations of . . . the entity of such state or local government that distributes [federal financial] assistance . . . (and each other entity) to which the assistance is extended, in the case of assistance to a state or local government. . . ." (Emphasis supplied). This plain language indicates that when the federal assistance is provided by a state agency to any other entity -- public or private -- such as a business, other private organization, or another public agency, these entities are covered in their entirety.

With respect to a grant, prior to Grove City, the program or activity receiving federal financial assistance at a grantee, rather than the entire grantee itself, would have been covered under these statutes. With respect to a contract, unless the federally funded contract was for the purpose of providing federal financial assistance, the mere contracting with a private organization or other public agency with federal funds would not have led to any coverage under these statutes before Grove City. Indeed, for example, a number of agency regulations expressly exclude federal procurement contracts from coverage and, by analogy as well as prior practice, such procurement of goods and services by a recipient with the use of federal funds would not have been covered.

QUESTION 5: Again, continuing with the example mentioned above, if the recipients of federal funds awarded to the state agency use those funds to purchase goods or services, would the providers of such goods or services be an entity subject to federal regulation under the definition of program or activity found in s. 557? If your answer is yes, please explain how they would be covered.

ANSWER 5: Yes, Section (1)(B) of S. 557 would cover the public and private providers of goods and services to an entity receiving federal funds initially awarded to a state agency if the entity uses those federal funds to procure those goods and services. This "trickle-down" and "trickle-around" coverage did not exist before Grove City. The language of this provision is so broad that it literally covers every single public and private entity that touches and passes along the initial federal financial assistance awarded to a state agency as well as the ultimate recipient of that federal financial assistance. There is no limitation in the phrase "to which the existence is extended" and, therefore, "each other entity" which gets the assistance that originally went to a state (or local government) will be covered under this provision.

QUESTION 6: Would an entire church, such as the Catholic church, be a "combination" as the word is used in section 4 if two or more parishes are recipients of federal financial assistance?

ANSWER 6: An entire church, such as the Catholic church or Catholic diocese, would be covered under the plain language of S. 557 as a "combination" under subparagraph (4) when two or more of its parishes receive federal financial assistance. This necessarily follows from the entire scheme of S. 557: A parish or church is a "private organization" which is covered under Section (3)(A) and (B) of S. 557 whenever "any part of [the private organization] is extended federal financial assistance." Because the Catholic church or a Catholic diocese is a combination including two or more of these parishes or churches and two such parishes or churches have received federal financial assistance, then "all of the operations of" that entire combination are covered. Such coverage never existed prior to Grove City. Indeed, if only one parish in a diocese or in the Catholic church is extended federal financial assistance and that parish is part of that larger combination, the entire combination is likely to be covered.

QUESTION 7: Would subsection 4 require coverage of an entire state government if two or more agency offices or divisions of that government received assistance?

ANSWER 7: This is a very broad provision which has no apparent stopping point in its scope of coverage. It appears that an entire State government would be covered by this provision if two or more of its agency offices or divisions received federal financial assistance: a state government can readily be deemed a combination of its separate agencies and divisions. Those agencies and divisions are covered under Section 1(A) and thus eligible to be covered by Section (4)'s reference to "any combination" described in Sections (1), (2), and (3). Thus, when two parts of that combination receive federal financial assistance, "all of the operations of" the combination are covered.

It also appears that, even when one entity described in Sections (1), (2), and (3) receives federal aid and is part of a larger combination, the combination is covered.

QUESTION 8: Please explain who you believe is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

ANSWER 8: It is not clear who is and is not covered by the term "ultimate beneficiary" found in Section 7 of the bill. It may be that the sponsors of S. 557 wish to exclude individuals who receive Social Security and Medicare payments, but this is not clear. What is clear, however, is that only those who are "ultimate beneficiaries of federal financial assistance excluded from coverage before the enactment of" S. 557 (emphasis supplied) are excluded -- ultimate beneficiaries of new federal financial assistance programs enacted after S. 557 becomes law would not be excluded.

QUESTION 9: In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S. 557 excluded from coverage under the four statutes addressed in legislation?

ANSWER 9: Ultimate beneficiaries of federal programs enacted after adoption of S. 557 would not be excluded from coverage under the four statutes addressed in this bill under Section 7 of the bill.

U.S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

APR 29 1987

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

I attach herewith the remaining answers to Senator Hatch's questions on S. 557.

Thank you very much for your consideration.

Sincerely,

Mark R. Disler

Mark R. Disler
Deputy Assistant Attorney General
Civil Rights Division

Enclosure

Responses to Questions Submitted by Senator Orrin G. Hatch

QUESTION 1: On page 15 through 17 of your prepared statement, you list a variety of entities which you believe would be covered under the language of S. 557. Would you explain whether these entities were covered prior to the Grove City decision and how you feel they would be covered under S. 557?

ANSWER 1: All of these are examples of coverage under these cross-cutting civil rights statutes which did not exist before Grove City:

Grocery stores and supermarkets participating in the food stamp program will be subject to coverage solely by virtue of their participation in that program.

Explanation. The operative provisions of S. 557 cover "all of the operations of -- . . .

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks or recreation, or

(B) the entire plant or other comparable, geographically separate facility to which federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship . . .

any part of which is extended federal financial assistance."

In light of the Supreme Court's holding in Grove City College v. Bell, 456 U.S. 555 (1984), that federal education aid to students subjects to coverage the financial aid office of the college attended by such students, these provisions of S. 557 will similarly subject to coverage grocery stores and supermarkets who accept food stamps. Like the college which must register with the Department of Education in order to enroll students receiving federal aid, the grocery store and supermarket must register with the Department of Agriculture in order to receive food stamps from customers. Like the college in Grove City, the grocery store and supermarket do not receive direct federal aid but only receive funds as a result of a "consumer" coming to it. After Grove City, the grocery store and supermarket stand in the same shoes as Grove City College. Indeed, in 1984 proponents of H.R. 5490, the forerunner of S. 557, admitted that grocery stores and supermarkets would be subject to coverage. E.g., Cong. Rec. H. 7038 (June 26, 1984).

Thus, participation in the Food Stamp Program by grocery stores and supermarkets will yield coverage under S. 557 in the same manner that participation in the alternate disbursement system of Pell grants yields coverage of a college's student aid office (Grove City College v. Bell, supra). A grocery store or supermarket is readily subsumed within the definition of "entire corporation, partnership, or other private organization, or an entire sole proprietorship" receiving assistance extended to it "as a whole" ((3)(A)(i)) and is also covered as a geographically separate facility comparable to a plant ((3)(B)). Further, since grocery stores and supermarkets provide food for the needy under the food stamp program, they might also be covered in their entirety as a business, partnership, other private organization or sole proprietorship which is principally engaged in the business of providing "social services" ((3)(A)(ii)).

Finally, if two grocery stores or supermarkets in a larger chain participate in the food stamp program, all of the other grocery stores or supermarkets in the chain will be covered by section (4). Section (4) covers "all of the operations of . . . any combination comprised of two or more of the entities described in paragraphs (1), (2) or (3). . . ." Grocery stores and supermarkets are covered by paragraphs (3) and (1) as mentioned earlier and, thus, if two (indeed, apparently even if one) of them in a larger chain receives federal financial assistance, all of the operations of the chain will be covered as a "combination". Indeed, one witness at the March 19, 1987, hearing before the Committee clearly supported such a reading of the bill in the context of hospitals. Statement of David S. Tatel Before the Committee on Labor and Human Resources at 7.

None of these S. 557 theories yielded such coverage prior to Grove City. As stated by Daniel Oliver, General Counsel, Department of Agriculture, in a July 1984 letter to Senator Jesse Helms:

The Department does not currently treat food stores which redeem food stamps as recipients of Federal financial assistance which are subject to the requirements of Federal anti-discrimination laws. There are no regulations or instructions that define these stores as recipients and the agreement between the Department and the stores concerning their participation in the food stamp program does not contain any reference to the requirements of the anti-discrimination laws.

This has been the practice of the Department since 1964 when the original legislation creating a food stamp program and the Civil Rights Act of 1964 were both enacted. Although a review of the Department's records has disclosed no program instruction or legal opinion confirming this position, it is clear from a review of the Department's records concerning enforcement of the Federal anti-discrimination laws and from discussions with numerous program officials that the Department does not treat food stores which redeem food stamps as recipients of Federal financial assistance for purposes of the Federal anti-discrimination laws. It is also clear that it has consistently adhered to this position over the last twenty years.

There is a reference to "small providers" in the Department's regulations concerning nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance (7 C.F.R. 15b.18(c)). That regulation has not been interpreted as referring to grocery stores, but only to the agencies and organizations that distribute food stamps to the ultimate beneficiaries. (Emphasis supplied).

Every school in a religious school system will be covered in its entirety if any one school within the school system receives even one dollar of federal financial assistance.

Explanation. Section 2(B) of the operative provisions of S. 557 covers "all of the operations of -- . . . a local educational agency (as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, *or other school system* . . . any part of which is extended federal financial assistance . . . ." (emphasis supplied).

A local educational agency as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965 is a public school system. Once all public school systems and systems of vocational education are identified as covered, the only school systems left to be covered by the bill's phrase "other school system" are private school systems, including religious school systems. Thus, if one elementary school in a diocesan school system receives any federal financial assistance, not only is the entire school covered, but so is every other school in its entirety in the diocesan school system.

This result will also occur as a result of Section 4's coverage of "any combination". In contrast to this expansion of pre-*Grove City* coverage, compare the Department of Education's definition of "educational institution" in its Title IX regulations which does not include private elementary or secondary school systems. 34 C.F.R. 106.2(j).

An entire church or synagogue will be covered under Title VI, Section 504, and the Age Discrimination Act, if it operates one federally-assisted program or activity, as well as under Title IX if the federally-assisted program or activity is educational (with exceptions under Title IX in those circumstances where Title IX requirements conflict with religious tenets).

Explanation. Under Section (3)(B), of the bill a church or synagogue is a "private organization" (it would also probably fit within the "corporation" subcategory) which is a "geographically separate facility" comparable to a plant. Accordingly, any federally-assisted program at such a "facility" would render the entire "facility" (i.e., synagogue or church) covered.

See also the answer to Senator Hatch's question number 4.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Explanation. Section 1(A) covers "all of the operations of a department, agency . . . of a state or local government . . . any part of which is extended federal financial assistance." See also Section 1(B).

Farmers receiving crop subsidies and price supports will be subject to coverage.

Explanation. The operative provisions of S. 557 state that "the term 'program or activity' means all of the operations of ---

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any combination comprised of two or more of the entities described in subparagraph (1), (2), or (3);

any part of which is extended Federal financial assistance."

Farms can fall within this provision in several ways:

- Crop subsidy programs and combinations of such programs, and similar federal farm aid, provide assistance to the farm as a whole.

- Moreover, a farm consisting of contiguous fields could readily be deemed a "geographically separate facility" comparable to a plant, and thus covered in its entirety.

- Farming may be regarded as a form of "social service" because it provides food not only for consumers but for those who receive food stamps and other welfare assistance.

Some might argue that the bill's Section 7 provides a "Rule of Construction" which, in effect, exempts farmers as "ultimate beneficiaries" of federal aid: "Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of federal financial assistance excluded from coverage before the enactment of this Act." This reasoning is unpersuasive because:

- There is no indication in the bill or by the bill's proponents as to which persons or entities are considered to be "ultimate beneficiaries" and under which federal aid programs. Does the bill's provision refer only to persons receiving Social Security, Medicare, and Medicaid? Does it even include businesses such as farms?

- The breadth of this bill is so sweeping that no one can presume that anyone is outside its coverage, unless specifically exempted.

- Farms appear to be clearly covered by subparagraph (3) of each of the bill's operative sections, as mentioned earlier, because farms are readily identified as business entities or private organizations or both.

- Even if farmers are regarded as ultimate beneficiaries of crop subsidies and similar federal funds who are exempt from coverage under Section 7, the section only applies to those ultimate beneficiaries "excluded from coverage before the enactment of [S. 557]" (emphasis supplied). Ultimate beneficiaries of farm programs adopted after S. 557's enactment are not excluded from coverage.

Others might argue that the bill's provision in Section 4(c) exempts many farmers from coverage:

> "Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection."

This argument is fallacious because:

- This language in the bill only applies under Section 504 (discrimination against persons with handicaps), and does not reduce any compliance burdens under the other statutes amended by S. 557.

- Even under Section 504, only some farmers will benefit from this exemption. Department of Agriculture Section 504 regulations (which are referenced by the provision) define "small providers" as entities "with fewer than 15 employees." Many farms employ more than 14 persons. (7 C.F.R. §15b.18(c)).

- These small providers are only exempted from the most onerous of Section 504 regulatory burdens: The requirement "to make *significant* structural alterations to their existing facilities. . . ." (emphasis supplied) -- and *only* "if alternative means of providing the services are available."

- These small providers will still be subject to many requirements including the following:
    - Paperwork and notice requirements; (7 C.F.R. §15b.7)
    - a requirement to consult with disabled persons or disability rights groups and to make a record of such consultations; (*Id.* §15b.8(c))
    - extensive employment regulations; (*Id.* §§ 15.b.11-15b.15)
    - regulations applicable to new construction or alteration of an existing building; (*Id.* §15b.19)
    - a requirement to "take appropriate steps" to guarantee that communications with hearing-impaired and vision-impaired applicants, employees, and customers can be understood; (*Id.* §15b.4(d))

Coverage of farmers receiving crop subsidies or price supports did not exist before *Grove City*. 110 Cong. Rec. 6325 (Sen Humphrey) (March 30, 1964). ("[Title VI] will not affect direct Federal programs, such as CCC price support operations, crop insurance, and acreage allotment payments. It will not affect loans to farmers, except to make sure that the lending agencies follow nondiscriminatory policies. It will not require any farmer to change his employment policies.")

Airlines, businesses using their own aircraft in their business activity, and commercial aviation generally will be covered if they use federally-assisted airports or the air traffic controller system*.

Entities using federally-assisted highways and seaports will be *covered*.

Entities using the National Weather Service will be covered.

Explanation. This coverage flows from Section (3) of S. 557 which covers the private sector. As explained in my testimony, supporters of S. 557 and its predecessors argued, even after *Grove City*, that federal aid to airports brings within the scope of these laws airlines using the airports, even though the airlines received no federal aid. Further, the argument was made after *Grove City* that the federal air traffic controllers subjected to coverage comercial aviation using the controllers. *See United States Department of Transportation* v. *Paralyzed Veterans of America*, 106 S. Ct. 2705 (1986), and briefs filed therein and at the court of appeals. This argument was rejected by the Supreme Court in this case.

**/* Following the decision in *Department of Transportation* v. *Paralyzed Veterans of America*, 106 S. Ct. 2705 (1986), the Administration supported successful legislation which amended Section 404 of the Federal Aviation Act, 49 U.S.C. 1374, to ban discrimination by airlines against persons with handicaps. The enactment of S. 557, then, will add additional (and, under Section 504, overlapping and duplicative) coverage.

Advocates of S. 557's predecessors argued, however, that this scope of coverage should exist under these cross-cutting statutes and stated that achieving such coverage must be an objective of Grove City legislation. For example, in a document entitled "Injustice Under the Law: The Impact of the Grove City College Decision on Civil Rights in America" prepared by prime supporters of the bill, including the Project on Equal Education Rights of NOW Legal Defense and Education Fund; the NAACP Legal Defense and Educational Fund, Inc.; the National Women's Law Center; the Disability Rights and Education and Defense Fund; and the Project on the Status and Education of Women of the Association of American Colleges, these groups state as one of the purported adverse impacts of the Grove City decision: "Airlines which use federally subsidized airports and federal air traffic controllers could" discriminate against disabled people within the airplane (emphasis supplied). This document was made part of the legislative history of S. 557's predecessor in the House of Representatives in 1985. Joint Hearings Before the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, at 207. (Hereinafter "Joint Hearings").

Indeed, R. Jack Powell, Executive Director of Paralyzed Veterans of America, plaintiffs in the case, in a statement submitted to the House committees holding hearings on this bill's predecessor on March 27, 1985, applauded the Court of Appeals for the District of Columbia Circuit for holding, prior to the Supreme Court's reversal, that under Section 504 even after Grove City, the benefit provided by the national air traffic controller system to airlines subjects the airlines to coverage even though the airlines do not receive federal aid. He also applauded the argument that, because the airports and airlines are "inextricably intertwined", aid to the airports covers the airlines. Joint Hearings at 996. See also a report on Grove City by the NAACP Legal Defense and Educational Fund, Inc., and the ACLU calling for the same result, at page 3 of their report.

Further, in a February, 1986 publication of the Disability Rights Education and Defense Fund, Inc., entitled "The Impact of the Grove City Decision on Section 504 of the Rehabilitation Act and Other Civil Rights Laws", this advocacy group also argued for support of the position that aid to an airport is aid to an airline and that the federal air traffic controller system constitutes federal financial assistance to commercial air transportation generally.

Thus, the very broad language of S. 557 supports a scope of coverage which treats airlines using federally-assisted airports or the federal air traffic controller system as themselves receiving federal financial assistance. Since "all of the operations of" these airlines are covered, even their non-airline activities will be subject to these cross-cutting statutes.

A business whose aircraft uses federally-assisted airports or the federal air traffic controllers system would similarly be covered.

Of course, if federal aid to an airport covers airlines using the airport, then how can it be denied that entities using federally aided highways and seaports are covered by analogy? If use of federal air traffic controllers subject to coverage all commercial aviation, then entities using the National Weather Service would also be covered by analogy.

A private, national social service organization will be covered in its entirety, together with all of its local chapters, councils, or lodges, if one local chapter, council, or lodge receives any federal financial assistance.

Explanation. Section (3)(A)(ii) makes clear that an entire private organization, or entire corporation, is covered in its entirety whenever any part of it is extended federal financial assistance if it is principally engaged "in the business of providing . . . social services . . . ."

Every college or university in a public system of higher education will be covered in its entirety if just one department at one school in that system receives federal financial assistance.

Explanation. Section (2)(A) covers "all of the operations of . . . a college, university, or other post-secondary institutions, or a public system of higher education . . . any part of which is extended federal financial assistance. . . ." Thus, if one department at one university in a public system of universities receives federal aid, not only is that college covered in its entirety, every other college in that system is also covered in its entirety.

Yet, Secretary of Education T.H. Bell stated that, prior to the Grove City decision, coverage of one public post-secondary institution did not result in coverage of the entire public system of higher education: "Under our post-secondary programs will aid to a particular campus of a multi-campus university result in coverage of the entire university system, including all of its campuses? If so, the bill expands pre-Grove City coverage." Testimony of T.H. Bell, Civil Rights Act of 1984: Hearings on S. 2568, before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. 227-228 (June 5, 1984).

A school, college, or university investment policy and management of endowment will be covered if the institution receives even one dollar of federal education assistance.

The commercial, non-educational activities of a school, college, or university, including rental of commercial office space and housing to those other than students or faculty, will be covered if the institution receives even one dollar of federal education assistance.

Explanation. S. 557 covers "all of the operations of . . . a college, university, or other post-secondary institution, or a public system of higher education . . . . any part of which is extended federal financial assistance" (2)(A) (emphasis supplied). Investment policy and management of endowment obviously fall within "all of the operations of" these entities.

As in the case of an educational institution's investment policy and management of endowment, Section (2)(A) subjects the institution's commercial, non-educational activities to coverage because they fall within the scope of "all of the operations of" an educational institution described in (2)(A).

Such coverage did not exist prior to Grove City. Harry M. Singleton, the Department of Education's Assistant Secretary for Civil Rights testified concerning this bill's predecessor:

> "[Under the bill] financial assistance flowing to only one part of the university, one department, building, college, or graduate school, would create jurisdiction in all departments, buildings, colleges, and graduate schools of that university, wherever geographically located, as well as in non-educational operations in which the university might be engaged such as broadcasting, rental of non-student housing, or even the management of its endowment fund. In declaring that all such operations of a college or university, even those absolutely unrelated to educational activities, are to be within the jurisdiction of the federal government, [the bill] goes well beyond its announced purpose of merely restoring that jurisdiction, previously exercised." Joint Hearings, 299-300. (Emphasis supplied).

A new, vague catch-all provision would provide additional coverage in uncertain ways.

Explanation. S. 557 would amend each of the four cross-cutting civil rights statutes to cover "all of the operations of . . . any combination comprised of two or more of the entities described in paragraph (1), (2), or (3) . . . any part of which is extended federal financial assistance . . . ." The first three paragraphs of S. 557 set forth coverage of state and local government, educational institutions and systems, businesses, and the private sector. This vague "catch-all" subparagraph (4) is of virtually unlimited scope and provides a great deal of discretion to federal bureaucrats and judges which will be circumscribed only by their imagination. It is clear, however, that it could readily be the basis for very expansive readings of the scope of the four amended statutes. For example, if a grocery store or supermarket chain had only two stores receiving food stamps while the rest of the stores in the chain did not receive food stamps, this clause would cover the entire chain as a "combination". Similarly, if a drug store or pharmacy chain had only two stores receiving Medicaid reimbursement, this clause would cover the entire chain as a "combination."

QUESTION 10: Do you believe that there are contradictions among witnesses concerning the scope of coverage prior to the Grove City decision. If so, would you please explain where such contradictions exist and what you believe to be the correct interpretation in those areas?

ANSWER 10: Let me provide just two which are indicative of the contradictory positions taken over the past three years by supporters of S. 557 and its predecessors:

1. One witness supporting S. 557 at the March 19 hearing, E. Richard Larson of the Mexican-American Legal Defense and Educational Fund, asserted that a pharmacy participating in the Medicaid program would not be covered under S. 557. Yet, Pat Wright, Director of Governmental Affairs for the Disability Rights Education and Defense Fund testified concerning a predecessor to S. 557 that there has been such coverage and that there will be such coverage after enactment of so-called restorative legislation. Hearings on S. 2568 before the Subcommittee on the Constitution, 98th Cong., 2d Sess., at 338 (June 5, 1984). Other witnesses either have said that the answer is unclear or have also taken the view that there was no such coverage and would not be such coverage under this kind of legislation. Althea T.L. Simmons, Director of the Washington Bureau of the NAACP said, "if you take the one

with reference to whether or not a retail pharmacist would be subject to Title VI regulations, because they process medicare and medicaid subsidized prescriptions, then the response would be "no". The local pharmacist, although beloved, is not within the scope of the intent of Congress." Hearings on S. 2568 before the Subcommittee on the Constitution, 98th Cong., 2d Sess., at 275 (June 5, 1984).

2. Mr. Larson, at the March 19 hearing, also indicated that a grocery store participating in the Food Stamp Program would not be covered by virtue of such participation. Yet, in floor debate of this bill's predecessor in 1984, in the House of Representatives, the principal co-sponsor of the bill there said that grocery stores participating in the Food Stamp Program are covered. (Cong. Simon, now Senator Simon) 130 Cong. Rec. at H. 7038 (June 26, 1984). Even then, another proponent of the bill during the same floor debate said that such grocery stores would not be so covered. (Congressman Miller) 130 Cong. Rec. at H. 7039 (June 26, 1984)). In both instances, S. 557 would provide coverage of the entities in question.

The CHAIRMAN. Thank you very much.

I just have a few questions, and I will submit the others. Would last year's Administration bill to reverse the Grove City decision apply to the education institutions only? And obviously, as you understand, the statutes affected by Grove City apply in employment, transportation, other non-educational activities. Section 504 is the only statute which deals with the disabled.

So why do you say that you are prepared to overturn the decision with respect to education, but you are not prepared to do it with regard to the other areas covered by these statutes?

Mr. DISLER. Mr. Chairman, the reason for that is—let me say at the outset that, of course, the coverage that will remain in the same scope that existed before Grove City, as I attempted to explain, is vigorous coverage in light of all the Federal aid that is being handed out.

The other principal reason is we have not seen actual examples of problems outside of the education area that are not covered currently by the agencies, partly because they hand out so much Federal aid. Indeed, in one of the letters that I will submit for the record, that I hope will get into the record, Secretary Dole said that, "The Department's view has always been that we had jurisdiction, for purposes of Title VI, over the programs or activities or portions thereof that receive DOT financial aid. The structure of the Department's financial assistance programs is such that we typically do not face issues similar to those raised in Grove City." In other words, the kind of aid that is being handed out today has enabled most of the other Federal agencies—Medicaid is another example—provides broad coverage. We simply have not found the same kind of problem outside of education as we have in education, and our view is that legislation, like all the previous legislation in civil rights, ought to address identifiable problems. And we have not come across and have not seen presented, much outside of education, and the one or two areas that we think exist, I alluded to in my oral statement, we think ought to be addressed separately.

The CHAIRMAN. Well, we will hear later in the morning from a panel of witnesses concerning disability discrimination and the fire department in Chicago.

Mr. DISLER. Yes, I am familiar with that case. And as I tried to indicate in the oral statement, which we consider to be a noteworthy comment, we believe that one of the potential gaps is employment discrimination against handicapped persons, and we have been considering what we think would be separate legislation that could properly address that.

The CHAIRMAN. Why wait for separate legislation, why not just go back to prior to the Grove City decision? You are changing all of those statutes, using similar kinds of language. You are prepared to go back to pre-Grove City with regard to education. The statutes themselves are rooted from the same trunk of the tree. Why not just make it applicable?

Why permit Federal funds to be used in any institution or any entity—we will leave that open now—if it is going to discriminate on the basis of handicap?

Mr. DISLER. Well, our view is that it has always been program-specific before Grove City; that our bill in fact does expand coverage in education.

The problem with the approach in S. 557, as I have tried to indicate, is that it is hard to find any limits there. That is why an approach by separate legislation—as we did in the airline case—is better. That problem was fixed quickly, and it had our support. But that airline legislation does not give rise to the notion that aid to airports is aid to airlines, and by analogy, Federal aid to seaports constitutes aid to those who use the seaports; Federal aid to highways constitutes aid to those who use the highways. That is why we think tailored approaches are better.

The CHAIRMAN. Well, you said in your 1984 testimony on the bill, and I quote, "It is my understanding of the broad approach before Grove City, if the fire department received aid from the Federal Government, it was only the fire department in its entirety which was covered under the broad approach."

Mr. DISLER. Our testimony?

The CHAIRMAN. Yes.

Mr. DISLER. Not—well, I will have to check. I do not think we testified to that. Our view has been—I will take another look at that, but our view has been——

The CHAIRMAN. I will have to take a look; it is printed in the hearings at page 26.

Mr. DISLER. If it is aid to the fire department, the fire department would be covered.

The CHAIRMAN. And it is part of the statement of "Mr. Disler."

Mr. DISLER. If aid has gone to the fire department, the fire department is covered. I may have misunderstood the question. I mean, I am not sure what the situation is in the fire department in the Chicago case.

The CHAIRMAN. We are going to hear later on about the Chicago fire department, that we have a decision by a court that since Grove City a claim of discrimination against the fire department that receives federal funds must be dismissed.

Mr. DISLER. Right, the Foss case.

The CHAIRMAN. Those are the problems that we are dealing with. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Mr. Disler, the Department's prepared testimony makes it quite clear that the Administration feels that S. 557 as drafted does not restore the law to what it was prior to the 1984 Grove City decision, but instead dramatically increases the scope of potential Federal regulatory jurisdiction.

Now, explain to us the legal basis behind the Department's assessment of this area.

Mr. DISLER. Well, we took a look at the reasoning behind the program-specific language and the reasoning behind how this bill goes broader that program-specific, broader than pre-Grove City.

Senator HATCH. You are saying before Grove City, it was strictly a program-specific bill.

Mr. DISLER. Yes. If you take a look at the plain language of the statute——

Senator HATCH. The language is very plain.

Mr. **Disler** [continuing]. "Program or activity" is less than an institution.

Senator **Hatch**. As I understand it, though, it was your understanding that it covers only programs or activities of the particular institution, which is what the Supreme Court decided.

Mr. **Disler**. Right. Indeed if you take a look at Title IX, at the text of that——

Senator **Hatch**. I understand. But even understanding that, you are saying that the Administration is willing to go beyond that.

Mr. **Disler**. In education, yes.

Senator **Hatch**. In education. And they are concerned about having a broadly-based statute that just allows unmitigated regulation and regulatory interpretations all over the whole gamut of life.

Mr. **Disler**. Right.

Senator **Hatch**. So that is what you are concerned about.

One of the previous witnesses stated that prior to the Grove City decision, a grant to a State department of education would subject both the department and all of its recipients to Federal regulatory jurisdiction. Now, would that be an accurate summary of the law prior to the Supreme Court's decision in Grove City?

Mr. **Disler**. No, I do not think it is at all. What happened before Grove City is if Federal aid went to a State department of education which then turned over the Federal aid to another entity for the purposes of the Federal program, then that latter entity's program receiving the Federal aid would be covered.

Senator **Hatch**. But not every——

Mr. **Disler**. But not merely recipients from the State department of education, no. That is incorrect, and it is the kind of gloss that gets put on this legislation that gives us concern.

Senator **Hatch**. Well, the same witness also stated that HEW conducted institution-wide compliance reviews with hospitals, even though the Federal assistance they received might have been limited to a particular clinic or program. He went on to state that HEW's institution-wide approach to civil rights investigations would have also resulted in extending the compliance review to nonmedical activities of the hospital or to non-Federally-funded hospitals owned by the same hospital chain.

Now, would that be an accurate summary of the laws that existed before the Grove City decision?

Mr. **Disler**. No, no. And indeed, there is regulatory material that suggests in the HHS regulations that if you have an unrelated activity that does not impact on the funded activity, that HHS would stay away from that. And indeed, what that is is the old trickle around theory. And the chain example of a chain of hospitals, one hospital of which is funded, and the other hospital is not, is another trickle around and trickle up and trickle down theory. That was not the case before Grove City.

One of the things that concerns me about S. 557's language when you roll it together with the legislative history that got created here already in the first day of hearings is that the bill is so broad in its language; yet its theme is supposedly restoration. When some of the witnesses try to explain that, well, it was that way beforehand, but they do not have examples of it and cannot point to actual practice, they wind up saying, well, we could have done it if we wanted to, which was the thrust of that testimony as I recall it. But the reason why they could not do it before Grove City is because they did not have the authority to do it even under their own regulations. So that coverage did not exist.

Senator Hatch. Well, using that illustration in this institution-wide approach with regard to hospital reviews, including all non-hospital functions and everything else, if that statement of the previous witness that I have just mentioned was true, how could a teaching hospital—you can see why some people are concerned who feel deeply about abortion—how could a teaching hospital or the City of St. Louis have been able to refuse to provide abortion services prior to the Grove City decision, or were they knowingly breaking the law, because they did refuse to do so?

Mr. Dehler. Well, S. 557's language under its Title IX section would seem to broaden it to cover that situation.

Senator Hatch. Well, it certainly would.

Mr. Dehler. Yes.

Senator Hatch. So you are saying if S.557 is granted, then they are not going to be able to refuse to provide abortion services. Is that right?

Mr. Dehler. Yes, I think that is right. And I think if you take a look at paragraph 3(a)(ii) of S. 557's sections, even under Title IX they talk about a corporation principally engaged in the business of providing education, health care—and it is right there—any part of which gets Federal aid, is covered in that whole facility.

So I do not see how the limitation on the mandatory abortion regulations survives that language, for example, in other parts of this bill. I do not see how it can do that.

Senator Hatch. Well, obviously, there is serious disagreement over several key provisions of this particular bill.

Would you explain how we should interpret the phrase "and each other entity" found in subsection 1(b) of the bill?

Mr. Dehler. Well, on its face it would seem that it would cover either public or private entities, because it is not limited to public entities.

Senator Hatch. It would cover everybody.

Mr. Dehler. With the possible exception of sole individuals. I do not know if that was the intention of the framers of this language. It may have been intended to cover just public entities, but it is not so limited in its language.

Senator Hatch. So it is pretty pervasive—that is what you are saying——

Mr. Dehler. Yes.

Senator Hatch. All right. Well, that is what has a lot of people concerned.

Would you explain how we should interpret subsection 4, which refers to "any combination comprised of two or more entities described in paragraphs 1, 2, or 3." How do you interpret that?

Mr. Dehler. I am at a loss to understand what was meant by that, and it is probably best directed to those who drafted it. But I fear that that catch-all phrase is going to be limited only by people's imaginations.

Again, I do not know that the sponsors wanted it to be so unlimited, but it is awfully gossamer language, it seems.

Senator HATCH. This is one of the things you are complaining about.

Ms. [illegible]. Yes.

Senator HATCH. It is one of the things I am complaining about. The reason, it is one thing to write legislation and allow the agencies to write the regulations with regard to it. But it is another thing to write legislation that is not clear, that could lead to all kinds of things that are oppressive to all kinds of entities. And that is one of the things that bothers me about this language.

Now, I will say this. This is an attempt to improve, with regard to ultimate beneficiaries and recipients covered by the prior bill, and I want to compliment the authors of this bill for at least making that attempt. But it still is not clear, and it still could lead to all kinds of mischief in the law and just really hundreds of thousands of lawsuits all over this country for no good.

Is that right?

Ms. [illegible]. I think so. I think it is going to be a real conundrum. I do believe that the rule of construction is an effort to try to put a limit in there. And I would like to hear more about what was intended by it. The problem is when you rewrite the rest of the statute, it is hard to know what is meant by "ultimate beneficiaries" and what the sponsors' understanding of pre-Grove City was.

Senator HATCH. Well, it also gives the courts ultimate leeway to decide whatever they want to in this area. It could be one way or the other. There is no real definitive language here that would let everybody know with some degree of certitude what their obligations are under this statute. So it really bothers me.

Let me just ask you this. You raised it. Why don't you explain who is or who is not covered by the term "ultimate beneficiary" which is found in the new section 7 of this bill? Who is covered by that?

Ms. [illegible]. I am not sure what is intended. It may be the Social Security recipient, the individual who gets Medicaid. I think that may have been the purpose of it.

Senator HATCH. But it is not clear.

Ms. [illegible]. It is not clear. If that is what is intended, I think that is a plus. But I have to say in terms of this bill from earlier versions of it, excluding the Social Security beneficiary, it would seem to be a bare minimum improvement. I would like to know what else it does.

I do not think it excludes coverage of the grocery store, for example, under the other parts of this bill—and they were never covered before, according to what the general counsel of the Department of Agriculture said in 1984.

Senator HATCH. You are saying they were never covered before the Grove City decision, this language does not exclude their coverage and therefore there is a very great likelihood they will be covered by this language.

Ms. [illegible]. Yes——

Senator HATCH. If that is so, that means the "mom and pop" grocery might have to meet the whole panoply of Federal regulations in handicapped, age, civil rights and Title IX.

Mr. Disler. With one minor exception in the Section 504 area, if they are below 15 employees. The most onerous burden would not be imposed upon them, but the others would be.

Senator Hatch. Sure. We always understand that, but that still means that local pharmacies, local grocery stores, a lot of local businesses, a lot of local nonprofit corporations, religious institutions, et cetera, might be covered under this bill, in a panoply of rules and regulations that none of them ever contemplated having to meet; is that right?

Mr. Disler. I think that is right. If I could take a moment to address—people have said——

The Chairman. I do want you to complete your answer, and then we are going to have to recess.

Mr. Disler. Okay. I just wanted to say this. Some people have said, well, so what if we cover this or that even if it had not been covered before. The problem I see in that is if there is not a problem of discrimination in a particular area like the grocery stores, then the burdens that come with Federal regulations—which are justified in a lot of other laws, including existing civil rights laws, that I have cited in my statement—but if there is no problem to be addressed, then the paperwork and the other requirements ought not to be imposed. And indeed—and I will just conclude with this observation—my recollection is two years ago when the Grocers' Association testified before the Civil Rights Commission on this matter, they said their profit margin was a penny on the dollar. And if there is no problem with discrimination, then imposing the paperwork and all the other requirements on them to take another piece of that penny ought to be avoided, in our view.

Senator Hatch. Well, it is one thing to impose them on Giant food chain or Safeway food chain. It is another thing to impose it on local business people and all kinds of businesses and corporations and religious institutions, who really do not have attorneys and accountants and all the things that are necessary to meet and comply with paperwork burdens.

Now, nobody should discriminate, but on the other hand there is not a great deal of evidence that there is discrimination in many of these areas—in fact, there is probably no evidence. And that is one of the things that is so onerous about this.

I just have one other question. We all would like to get over to Senator Zorinsky's commemorative meeting. But prior to the Grove City decision, were organizations engaged in the business of providing education, health care, housing, social services, or parks and recreation treated any differently from other organizations as they are in S. 557?

Mr. Disler. No, they were not. And there is no basis for that—and I am glad you raised that point, because the bill, while purporting to be restoration, even in its own terms is a refutation of that title, because by creating a two-tier standard of coverage in the private sector, that if you are in five categories of activity, and you get aid to your plant, your entire corporation is covered, and if you are outside of those five, only the plant is covered, finds no basis in the language of these statutes which are not defined by the type of activities of covered programs. It finds no basis in the legislative history. I do not think there is a case that defines it that way. And there is just no basis for covering some of them more than others. And I do not see how that can be described as a restoration principle, because the two-tier coverage simply did not exist before, and there are cases that hold that coverage in the private sector was program-specific. I have cited some of those.

Senator **Hatch**. Well, I wish we had time, but literally one of the biggest problems with this type of legislation is that it is broadly written with no limitations for the most part, even though there has been an attempt. I compliment the authors for that attempt, but the problem with this legislation is that nobody knows where it is going, what it is doing. Once you get past the basic discussions of what is or is not discrimination that all of us can agree on, there is a whole panoply of discussion about what is or is not discrimination where there is a lot of disagreement. And that is where you get into problems, because it depends on whose Administration it is, what kind of regulations are going to be written. And once those regulations are written, all these people come under the umbrella and have to meet duties and obligations and Federal problems that they never, never contemplated in their lifetimes. And anybody who has filled out their tax returns for this year, I think, can understand how one form can make it just miserable for everybody in America.

Now, modify that millions of times, and that is what you get into with this type of, I think—and I do not want to denigrate the attempt—but I think, badly-written legislation, though this is better than what it was, I have to admit that.

The **Chairman**. Senator Weicker, the leadership is having a brief ceremony in the rotunda at the Russell Building in honor of Senator Zorinsky, with the blood testing, so we have agreed to recess for 15 minutes, and then I would recognize you. We will resume in 15 minutes.

The only point I would make is that these horror stories were never heard prior to the Grove City decision. We never, to my knowledge, had this hue and cry about the burden that was being placed upon the businesses in this country. And I think we are all familiar with the ability to say what the bill does not do and then differ with it.

Senator **Hatch**. Well, let me just say one thing. We are not listing horror stories here. I am just saying that this bill is not understood. And people in America feel that the Federal government is on their backs on everything, and if you do not write the legislation so that people in America know what their rights and obligations are, then they are going to feel even more that, my gosh, we back here are dictating everything.

The **Chairman**. Well, we will have an opportunity——

Senator **Weicker**. Mr. Chairman, may I just say one thing?

The **Chairman**. Sure.

Senator **Weicker**. We had three years to go ahead and write this legislation——

Senator **Hatch**. And we have written it a few times.

Senator **Weicker** [continuing]. Three years that we have had to try to write this legislation. The fact is, we could not write this legislation out of this Committee for three years, nor even consider it—one brief hearing by the Committee, one brief hearing by the Education Subcommittee.

So let us make it very clear that this matter has been before us for three years; many of us have thought about it for three years. But we have not acted on it. Now, when we are acting on it, people say we have not given it thought, there is not enough time. That just is not a matter of the record.

The CHAIRMAN. We will stand in recess for 15 minutes.

[Recess.]

The CHAIRMAN. We will come back to order and recognize the Senator from Connecticut.

Senator WEICKER. Thank you, Mr. Chairman.

Mr. Disler, would the Administration's bill address employment discrimination outside of educational institutions?

Mr. DISLER. Yes. It would cover employment discrimination in Federally-funded programs. There is an exception that is built into Title VI where the only employment discrimination there that is covered is that which has the purpose of employment. But other than that, we would cover it in the Federally-funded program.

Senator WEICKER. Now, I am a little bit concerned over the very expansive statement made before the Committee as to the enforcement by this Administration of civil rights. Just as recently as this matter of the back-dating of civil rights documents—I am now quoting from the Washington Post—"Inspector General James B. Thomas referred to evidence in Boston that the Justice Department declined prosecution. 'Without minimizing the seriousness of the issue, enhanced as it is by an outstanding and apparently well-understood court order, the fact that the dating discrepancies appear small in number lead me to believe our resources are best put to use elsewhere,' Assistant U.S. Attorney Richard Sterns wrote in December."

Is this part of the vigorous enforcement effort by the Department?

Mr. DISLER. Well, Senator Weicker, I think that——

Senator WEICKER. The reason I ask this question is that my experience as Chairman of the Subcommittee on the Handicapped with the Justice Department has been that there has been somewhat less than vigorous civil rights enforcement by the Justice Department, of which you are part and parcel.

For example, when we had our institutional hearings in the Subcommittee on the Handicapped on the care of institutionalized, mentally disabled persons, Assistant Attorney General Reynolds submitted a list of cases that had been submitted to the Justice Department where violations were alleged. And not in any one of these cases—and there were some 20, 25 in number—had any activity taken place vis-a-vis enforcing the civil rights of institutionalized persons by the Justice Department.

And indeed nobody was behind the scenes more vigorously opposing either the legislation allowing attorneys' fees for successful parents in Public Law 94-142 cases as was the Civil Rights Division of this Justice Department; nobody opposed the legislation creating a protection and advocacy system for the mentally ill more than the members of this particular Justice Department.

I fail to see as where the retarded, the mentally ill, the disabled, or minorities are concerned, where all this vigorous enforcement is taking place.

Mr. DISLER. Senator Weicker, let me respond, and if I miss one of the points, I am sure you will remind me. With respect to the Education Department—although I think that inquiries are probably best directed to them on that—it is my understanding that remedial action was taken by the Department of Education. With respect to criminal prosecutions, that is something the Civil Rights Division, at least, would not be involved in regarding the back-dating. But I understand that remedial steps were taken when the problem was uncovered at the Department of Education.

With regard to our CRIPA activities, I would be glad to update you on those, because that is an area which I help to oversee, and in fact—I do not know the date of the information you have got—but we have been quite vigorous. I think we have got more lawsuits going against recalcitrant defendants than we have had before, because some of them are beginning to resist us. We have had any number of investigations and any number of consent decrees, and we have acted on any number of matters.

With respect to our enforcement record generally, the charge has been made and answered many times about that record, and rather than get into all that, I think what I would like to do is to send you something that we prepared by way of summary——

Senator WEICKER. Sure. Why don't you go ahead and do that and submit it for the record.

Mr. DISLER. Thank you.

[NOTE.—Due to printing limitations, and in the interest of economy, the material submitted by Mr. Disler was retained in the files of the committee where it may be reviewed upon request.]

Senator WEICKER. In your testimony you state the Administration would like to have the so-called abortion-neutral Tauke-Sensenbrenner amendment added to the bill, and you further state, "This abortion-neutral language is clearly consistent with the original meaning of Title IX when enacted."

Mr. DISLER. Yes, sir.

Senator WEICKER. If the Administration believes this to be the case, then why don't you withdraw the Title IX regulations that you find so objectionable?

Mr. DISLER. I think that is a fair question, and there are a couple of reasons, Senator Weicker, why, while we have considered that and it is an option, why we have decided that legislation is better.

First—and indeed, there is precedent for the way we are approaching this that I would like to get to in a minute—but the principal reason is we think there ought to be a permanent repair to that problem. And regulatory change that we make can be changed later on, and we think it is a problem that ought to be addressed permanently.

And if I could draw your attention quickly to two points that we think buttress the way we are going about it, you might recall in the middle-Seventies, the Department of Education advised on Arizona school district that its father-son banquet was illegal under Title IX, and that disturbed a number of people, including your former colleague Paul Fannin from Arizona. He got up on the floor of the Senate and said, "I know that President Ford is concerned about this, but an administrative fix to this problem can be changed again administratively."

So Congress legislated a permanent protection into Title IX—it is there now—of the father-son, mother-daughter banquets. And it seems to us that if Congress can take legislative action to protect permanently the father-son, mother-daughter banquets, it can take permanent action to remove the mandatory abortion features of the regulations.

And the other precedent, I must say, is in S. 557 itself. Proponents of that bill have sought to legislate with respect to regulations. And I do not see why people who do not like a particular regulation cannot do the same. I mean, your bill seeks to codify permanently certain regulations. So I am puzzled why that is okay, but those who have concerns about a regulation that they do not like cannot try to remove it permanently.

Senator WEICKER. Well, my problem, of course, is that you have had ample time to go ahead and change these regulations. You have never raised this issue up until this very moment.

Mr. DISLER. Well, it was an issue that was drawn to our attention, quite frankly, by interest groups and particularly by Congressmen Sensenbrenner and Tauke.

Senator WEICKER. I understand. But the fact remains that you have changed, or you have tried to change, everything else in this Government by regulation; why the sensitivity to this particular——

Mr. DISLER. No, no, we have not tried to change everything else by regulation. But I would go back to the initial point. It seems to me that it is a problem that ought to be fixed on a permanent basis the same way the father-son banquet was fixed. The way to do that is through legislation, because otherwise our change can get changed later on.

And again I point out that I am puzzled that proponents would relegate others to administrative changes rather than legislative fixes of problems in the regulations when the proponents of S. 557 themselves are seeking to codify certain regulations that they like.

Senator WEICKER. I think the difficulty comes in the fact that for three years now, the Administration has had the opportunity to positively effectuate the necessary change to correct the Grove City decision and has declined to do so—has declined to do so.

Mr. DISLER. You mean the abortion phase of this.

Senator WEICKER. No, no, no. I am talking about the civil rights issues involved in Grove City. Abortion has never been an issue on Grove City until it was raised just now. I am talking about trying to rectify the problems raised by Grove City.

Mr. DISLER. Okay.

Senator WEICKER. It was not done at the Administration level. It was not done at the committee level or in the Republican-controlled Senate. It was not done, period.

So let us understand there has been plenty of opportunity for the Administration to adopt a positive role in this, and it has declined to do so——

Mr. DISLER. Well, we have proposed legislation.

Senator WEICKER [continuing]. No, no, no——

Mr. **Disler**. Yes, we have.

Senator **Weicker** [continuing]. I now am speaking; you will have your chance to respond——

Mr. **Disler**. Thank you.

Senator **Weicker** [continuing]. Just as the Administration has had, again, its opportunity for three years to go ahead and amend those portions of the regulations as applied to abortion which they now find objectionable.

And the difficulty right now—and I think both you and I are aware; you know, we are not naive, we are not dealing in a vacuum, and we are well aware of the ramifications here—is that you are really putting a great deal of water on the shoulders of those that are trying to carry forth the initial purposes here in correcting the Grove City decision, and in so doing, hope that maybe that will go ahead and slow it down or bring it to a grinding halt.

I have no problem—if the Administration wants it as a freestanding issue, let us have it as a freestanding issue. Fair enough. Would you deem that proper, or do you feel that this ought to go ahead and be part of Grove City?

Mr. **Disler**. We think this is the proper vehicle. That point was raised about a freestanding bill, I remember, in the House, and Congressman Henry Hyde made the observation that he had heard that before, and he referred to the House Judiciary Committee as the Bermuda Triangle of abortion legislation—it goes in and it disappears.

So we think that the best way to deal with it is through legislation, and this is the proper vehicle.

With respect to the other points, we have sought to address the problem. We supported legislation in the last two Congresses; we support it here to address Grove City.

And with respect to the Committee, I can recall myself being in the room when the then Chairman called mark-ups, and he was the only one present, repeatedly, to address the bill. I can recall that myself in 1984. So I do not know that the Committee——

Senator **Weicker**. Mr. Chairman, I would hope that we would address—and I realize my time is up, and then I have got to go to the Floor to speak on the highway bill—but I would hope that again the focus of the Nation remains on Grove City, remains on the discrimination manifested through taxpayer funds that is imposed on women, minorities, the elderly, and the handicapped. That is the issue that brings us here, and I do not want that to be diverted onto, quote, "abortion". Lets keep our eye on the ball.

And indeed, believe me, those advocates of anti-abortion legislation will have multitudinous opportunities to present their point of view as each piece of legislation reaches the Floor. But I would hope the time of the Committee will be spent, the time of the Nation will be spent, and the time of the Senate as a whole will be spent on making certain that women, minorities, the elderly and the disabled are not discriminated against with the use of taxpayer funds. That is the issue.

Senator **Hatch**. Can I just take one second more?

The **Chairman**. Yes.

Senator **Hatch**. I agree that is the issue. We do not want that to happen. On the other hand, we do not want everybody in the country to be persecuted to death because we do not write a bill carefully enough, so we saddle them with another group of regulations that may or may not work, and that may actually lead to discrimination in the regulations themselves.

So you know, there is nothing wrong—in fact, there is every right, it seems to me—to ask how we can clarify this and make it so that it really does work for the benefit of all people that you, Lowell, and I are both concerned about. We have worked hard.

And I might add, over the last six years before this year, we worked very hard on handicapped issues. You led the fight. I worked very hard with you. I have always done that.

Senator WEICKER. If the Senator will yield, he was second to no one——

Senator HATCH. I appreciate that.

Senator WEICKER [continuing]. In his advocacy, in his support of legislation for the handicapped—second to no one. And that should be made a part of the record.

Senator HATCH. Well, I appreciate that.

The CHAIRMAN. We will have an opportunity to debate this, I am sure, to discuss it in our committees and also to debate it on the Floor.

I would like to, if we could, move along. I want to thank you. If there are other questions, we will permit them to be submitted for the record.

Mr. DISLER. Mr. Chairman, could I clarify one point, quickly?

The CHAIRMAN. A brief point.

Mr. DISLER. I appreciate it. The excerpt from the 1984 testimony, if I could just clarify that very quickly.

The CHAIRMAN. Oh, yes. Go ahead.

Mr. DISLER. What I was doing there—and your staffer was kind enough to let me take a look at it——

The CHAIRMAN. This is dealing with the Chicago Fire Department.

Mr. DISLER. The fire department example.

The CHAIRMAN. We will make that a part of the record.

Mr. DISLER. Even those who had claimed before Grove City that there was a broad interpretation—and I argued then, as I argue now, that it was always program-specific—but even those who had asserted broad coverage had never tried to get the entire city government, by virtue of the aid to the fire department. So I was simply saying even under that broad approach of some—that was not our approach, but the approach of some—you still could not go as broadly as that bill did in 1984. And that was the thrust of that, and I appreciate the opportunity to clarify that.

The CHAIRMAN. Thank you very much. We appreciate it.

Mr. DISLER. Thank you, Mr. Chairman.

The CHAIRMAN. We will ask our next panel of witnesses to come forward. We have Mr. Richard Foss from Chicago, Mr. Jerry Kicklighter from Savannah, Georgia, Arlene Bern of Amarillo, Texas, and Leslie Leier, also of Amarillo.

We want to thank them all very much for coming, and we appreciate their willingness to share some of their own personal experiences with the Members of the Committee. So if they would be good enough to come forward, please.

Senator **Hatch**. Mr. Chairman, I understand that Senator Thurmond has a question for Mr. Disler, and he is just walking in and I wonder if he could just ask the one question, if you would accommodate him. But also, Mr. Chairman, at an appropriate place in the record could we put the letter from Richard F. Rosser, President of the National Association of Independent Colleges and Universities?

The **Chairman**. Yes, we will include that.

Senator **Hatch**. Thank you.

[The letter referred to follows:]

National Association
of Independent
Colleges and Universities

June 23, 1987

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

Thank you very much for responding to our letter regarding S. 557, the Civil Rights Restoration Act of 1987. We greatly appreciate your taking our views and concerns into consideration. The bill is one that is very important to our colleges and universities since it will help to ensure educational advancement and opportunity regardless of race, sex, age or disability.

As you know, we have expressed concern about the existing religious exemption under Title IX. I have enclosed a copy of our statement before the Senate Labor and Human Resources Committee, which details our concerns and expresses our support for the bill, as amended to meet religious liberty concerns.

Many thanks for your consideration.

Sincerely,

Richard F. Rosser
President

enc.

122 C Street, N.W. • Suite 750 • Washington, D.C. 20001-2190 • 202/383-59[illegible]

STATEMENT

TO THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

SUBMITTED FOR THE RECORD OF
THE APRIL 1, 1987 HEARING ON S. 557,
THE CIVIL RIGHTS RESTORATION ACT OF 1987

ON BEHALF OF

THE

NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES

APRIL 10, 1987

Introduction

The Civil Rights Restoration Act of 1987, S. 557, is of critical importance to the National Association of Independent Colleges and Universities (NAICU) and we support the bill. NAICU was established in 1976 in order to provide a unified national voice for the concerns of independent higher education. NAICU's membership includes more than 800 college and universities whose variety in size, curriculum, and mission exemplifies the rich diversity of independent higher education (membership list attached). More than two million students attend NAICU member institutions, from the large research university to the small church-related college.

NAICU is deeply committed to the goals of non-discrimination and equal opportunity in higher education. We embrace these social policy goals as part of our fundamental responsibility as institutions of higher learning. NAICU, therefore, supports the bill's broad coverage of our colleges on an institution-wide basis. We are strongly committed to the elimination of any discriminatory acts or practices on any college campus in the country, and hope that the higher education community may serve as an example to the rest of the nation.

As detailed in this statement, NAICU supports S. 557 but urges the Congress to add a religious tenet amendment to Title IX. In addition, NAICU hopes that the Congress will confirm, through legislative history, that S. 557 is not intended to affect the tax-exempt status of higher education institutions, nor is it intended to affect the current statutory exemption such as that afforded to single-sex institutions.

The Title IX Religious Exemption

The area of most serious concern to NAICU is the limited religious tenet exemption for religious educational institutions which is contained in Title IX. The current exemption was adopted as part of the original enactment of Title IX in recognition of the important need to protect and guarantee the full exercise of religious liberty by church-related schools, and to ensure that students in such schools can utilize federal support. This exemption allows religious educational institutions, which are "controlled by a religious organization," to claim an exemption from specific Title IX regulations if there is a conflict with particular religious tenets of the controlling religious organization.

Under the regulations promulgated by the Department, educational institutions wishing to claim the exemption must submit "in writing to the Assistant Secretary, a statement by the highest ranking official of the institution, identifying the provisions of Title IX which conflict with a specific tenet of the religious organization." It is important to keep in mind that this does not provide a blanket exemption from all Title IX requirements but, rather, is limited to the particular regulation(s) which are inconsistent with religious tenets.

Between enactment of the regulations in 1975 and now, there have been 218 exemption applications submitted by various institutions across the country, most submitted in the late 1970's. Until 1985, the Department of Education engaged in no substantive action upon these applications, and institutions were left uncertain of their status. Clearly, this had a chilling effect on the full exercise of religious liberty. While we applaud the Department's recent action to process these claims, allowing several years to lapse before beginning such action is unwarranted and unreasonable. We hope that the Committee will encourage the Department of Education to avoid such delays in the future.

It appears that part of the difficulty encountered by the Department in resolving religious exemption requests is determining whether an educational institution is "controlled" by a religious organization. The Department has interpreted the "control" requirement under current law as requiring that church-related colleges meet one of the following conditions:

(1) be a school or department of divinity; or

(2) be a school that requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or

(3) be a school whose charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

> **such term ["program" or "activity"] does not include any operation of an entity which is controlled by or which is closely identified with the tenets of a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organizations.[*]**

The purpose of this proposed amendment is to appropriately clarify which institutions may seek the limited exemption from certain Title IX requirements. The amendment will protect important religious liberty interests, and will not undermine the important non-discriminatory principles embodied in Title IX and other civil rights statutes.

The proposed language has been carefully drafted. First, the exemption is limited in scope and does not allow a college to unilaterally claim a blanket exemption from all Title IX requirements. Rather, there must be a particular religious tenet and a particular Title IX regulation in conflict before the exemption will apply. Title IX coverage will properly apply to all other aspects of the institution's activities.

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[*] The language of this religious tenet exemption has recently been adopted into law in another educational context. More particularly, during consideration of the Higher Education Amendments of 1986, Congress added an identical religious tenet provision to the College Construction Loan Insurance Association Program. (The exemption in this context was based on a religious anti-discrimination requirement, not an anti-discrimination requirement based on sex.) See Section 752(e)(2) of the Act.

In addition, under the regulations, a college must apply for the exemption. The Department of Education reviews each exemption request submitted, and grants or denies the request based on the facts presented. The limited nature of the exemption is further highlighted by the fact that the Department retains jurisdiction to investigate any college which receives an exemption and it may rescind a grant previously made.

It should be noted that only a limited number of schools closely identified with the tenets of a religious organization will have problems with the Title IX regulations and will seek the specified exemption. In addition, only a very few title IX regulations will be a problem for religious institutions. Many religious schools will comply fully with the regulations and will not seek an exemption, despite its availability.

Conclusion

We strongly support S. 557. In urging certain changes, our intent is to improve and clarify the legislation, so that our colleges and universities have a clear understanding of their duties and responsibilities in the area of civil rights.

NAICU supports the laws affected by S. 557, and its member institutions re-pledge their efforts toward fulfillment of the goals underlying those laws.

Thank you for allowing NAICU to submit this statement for the record.

The CHAIRMAN. We have introduced our second panel, Senator Thurmond, but would be glad to accommodate you if you have a brief question, or you could submit it for response for the record.

Senator THURMOND. Mr. Chairman, if there is no objection, I would like to ask Mr. Disler.

The CHAIRMAN. All right, fine.

Mr. DISLER. Yes, sir.

Senator THURMOND. I have been tied up in three committees this morning, but I have two or three questions I would like to ask you.

One of the major criticisms of the 1984 predecessor of S. 557 was that its language was extremely broad and it would have gone far beyond mere restoration of the law to a State prior to the Grove City decision.

At first glance, it may appear that S. 557 is more narrowly drafted. However, there are several key clauses in the bill which may cause it ~~to su~~ffer the same effects as its predecessor. In each of the four operative parts of S. 557, there are three sections basically defining the many various types of programs or activities to be covered by the pertinent statutes if they receive Federal financial assistance. Each part also contains a fourth section which would provide coverage of any combination comprised of two or more of the entities described in paragraphs 1, 2 or 3. Now, can you tell us what you perceive to be the meaning of this section?

Mr. DISLER. Senator Thurmond, that paragraph 4 catch-all provision, it is hard to tell exactly what that means. I think I might have mentioned earlier this morning I think it provides an opportunity for fairly unlimited coverage. I do not know what is meant by "combinations"; perhaps the sponsors have something specific in mind. I hope that they will elucidate that, and there might be a better way of trying to phrase that. But I think it provides an opportunity for fairly unlimited coverage. I do not know how to define what is meant by that subparagraph 4. Maybe some of the later witnesses supporting the bill will have an explanation.

Senator THURMOND. Do you believe that the word "combination" used here would include an entire State government if any part of the government receives assistance? After all, isn't the State government a combination comprised of two or more of the entities described in paragraphs 1, 2, or 3 of each operative part of the bill?

Mr. DISLER. Well, I had not thought of that, but now that you mention it, I think there is a potential for that kind of reading. To be fair about it, I do not know that the sponsors meant that kind of coverage, but I think that as you set it forth here, Senator Thurmond, there is at least a potential for that kind of interpretation, yes.

Senator THURMOND. Do you believe that an entire church—and I use the word in the broad sense; for example, the Catholic Church—do you believe an entire church would be a "combination" as used in Section 4? After all, churches are private organizations, and many have school systems. Are there not then combinations comprised of two or more of the entities described in these three paragraphs which precede Section 4 and therefore are covered in their entirety if any of their parts receive Federal financial assistance?

Mr. **Disler**. I think that is a reasonable way of reading that language on its face, yes.

Senator **Thurmond**. Mr. Disler, I just have two very short questions left. If this clause used throughout S. 557 extends coverage of the statutes in the manner I have just described, would such coverage be consistent with coverage that has existed prior to the Grove City decision?

Mr. **Disler**. No, not as to our understanding of that, no.

Senator **Thurmond**. And the last question is: Can you think of any other logical interpretation of the clause which covers combinations?

Mr. **Disler**. No. I think we ought to leave that to the people who wrote it. I think that, Senator Thurmond, it has been helpful for you to raise those examples, because if you read the language literally, it could include what you have described. I sort of threw my hands up at it, but I guess that is kind of a risky thing to do. We ought to try to raise the kinds of examples that you identified and find out if that is what was intended, and if not, then it seems to me that there is reason to try to repair that, to say the least. But I think that your examples are well-taken on their face, and that was not the way it was before Grove City, and I think those are legitimate concerns.

Senator **Thurmond**. Mr. Chairman, I want to thank you for your courtesy. Those are all the questions I have. Thank you very much.

Mr. **Disler**. Thank you, Senator.

[The following material was subsequently supplied for the record:]

U.S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

You have requested further discussion of my explanation as to how S. 557 subjects grocery stores to coverage under at least three of the four civil rights statutes (Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975) amended by the bill. Specifically, you have asked whether the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984) itself leads to coverage of grocery stores under these statutes even in the absence of S. 557.

The Grove City decision, alone, does not subject grocery stores participating in the food stamp program to coverage under these civil rights statutes. Nothing in my response to Senator Hatch's questions, delivered to Senator Kennedy on April 29, 1987, suggests otherwise.

The Grove City decision turned on the interpretation of the language and legislative history of the Education Amendments of 1972 of which Title IX is one part. In short, the Supreme Court determined that Congress intended by its enactment of Title IX within the Education Amendments of 1972 to provide coverage of educational institutions enrolling students receiving federal aid dispensed under the Education Amendments of 1972 (albeit only to the program or activity at the educational institution receiving that federal aid, i.e., the institution's student aid program), see, e.g., 465 U.S. at 563. Thus, the Grove City decision itself, standing alone, yields no basis for coverage of grocery stores participating in the food stamp program, drug stores or pharmacies participating in the Medicare or Medicaid program, or any other coverage except that held to exist by the Supreme Court in the Grove City decision.

As I made clear at length in my April 29, 1987 letter, S. 557 has language so broad that, in light of the Grove City decision, S. 557 will readily yield coverage for the first time ever of grocery stores participating in the food stamp program. I respectfully draw your attention to pages 1 through 3 of my attachment to my letter to Senator Kennedy discussing this matter.

I think it useful to reiterate the remarks of Daniel Oliver, General Counsel at the Department of Agriculture who said in a July, 1984 letter to Senator Jesse Helms:

> The Department does not currently treat food stores which redeem food stamps as recipients of Federal financial assistance which are subject to the requirements of Federal anti-discrimination laws. There are no regulations or instructions that define these stores as recipients and the agreement between the Department and the stores concerning their participation in the food stamp program does not contain any reference to the requirements of the anti-discrimination laws.
>
> *This has been the practice of the Department since 1964 when the original legislation creating a food stamp program and the Civil Rights Act of 1964 were both enacted. Although a review of the Department's records has disclosed no program instruction or legal opinion confirming this position, it is clear from a review of the Department's records concerning enforcement of the Federal anti-discrimination laws and from discussions with numerous program officials that the Department does not treat food stores which redeem food stamps as recipients of Federal financial assistance for purposes of the Federal anti-discrimination laws. It is also clear that it has consistently adhered to this position over the last twenty years*.
>
> There is a reference to "small providers" in the Department's regulations concerning nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from Federal financial assistance (7 C.F.R. 15b.18(c)). That regulation has not been interpreted as referring to grocery stores, but only to the agencies and organizations that distribute food stamps to the ultimate beneficiaries. (Emphasis supplied).

Nothing in the *Grove City* decision itself alters this absence of coverage. Moreover, in the more than three years since the decision, proponents of overly expansive legislation such as S. 557 have produced no evidence of coverage of grocery stores participating in the Food Stamp program before *Grove City*. Yet, so bent are principal proponents of S. 557 to expand the reach of the Federal government under the laws amended by S. 557, that they have refused to concede that such coverage of grocery stores participating in the food stamp program did not exist before *Grove City*.

Indeed, as I cited in my response to Senator Hatch's question in my letter to Senator Kennedy, although proponents of S. 557 and its predecessors have often confused or misstated not only the scope of pre-Grove City coverage but also the scope of S. 557, a number of these proponents have attempted in the legislative history of Grove City legislation dating back to 1984 to achieve such new coverage. Indeed, the language of S. 557 will achieve their purpose.

It is possible to draft language avoiding such an expansion of federal jurisdiction, but S. 557 does not do so.

Sincerely,

Mark R. Disler

Mark R. Disler
Deputy Assistant Attorney General
Civil Rights Division

cc: Honorable Edward M. Kennedy
Honorable Orrin G. Hatch

The CHAIRMAN. Mr. Kicklighter, if you would be good enough to start off, we will hear from you, and then we will hear from the rest of the panel, and then we will have some questions.

We are very grateful to you for coming here today and telling us your story.

STATEMENTS OF JERRY KICKLIGHTER, BELLVILLE, GA; RICHARD FOSS, CHICAGO, IL; ARLENE BERN, AMARILLO, TX; AND LESLIE LEIER, AMARILLO, TX

Mr. KICKLIGHTER. Mr. Chairman and Members of the Committee, thank you for giving me this opportunity to tell my story.

My name is Jerry Kicklighter, and I am from Bellville, Georgia. When I was 16, I was diagnosed as having epilepsy. I had nonconvulsive petit mal seizures which lasted for a maximum of 30 to 40 seconds.

I received an associate degree from DeKalb Community College in 1972. I then went on and got my bachelor's degree in science education from the University of Georgia, a master's degree from Georgia State University, and an education specialist degree from Georgia Southern College.

In the summer of 1974, I was hired by DeKalb Community College to be an adjunct instructor. A few months later, in September of 1974, I was hired as a full-time instructor in biology and botany. I worked full-time there at the school until 1977. I had always wanted to be a teacher and was proud to be teaching at my alma mater.

I enjoyed my job and consistently received positive performance evaluations. However, in March of 1977, I was requested by Dr. Marvin Cole to give a letter from my neurosurgeon to my employer concerning my safety as related to epilepsy. This letter, if provided, was to give me a guarantee as far as a contract for the following year. However, in April of 1977, I discovered my contract was not going to be renewed. I met with Dr. James Hinson, the chief administrator of the college, who was also the superintendent of Dekalb County Schools, and asked him why my contract was not being renewed. He would not tell me. However, he did inform me there were other jobs, five to be exact, that would be open in the school system and advised me to apply for them. Trusting my colleague's judgment, I submitted applications.

I was denied all of these jobs. The reason I was not given a contract was because I had been terminated by the college. I was shocked. I had never had a negative performance evaluation. All of a sudden, I was not qualified for any teaching positions.

I requested that the college give me a hearing and was refused. The college never put anything in writing as to why I was terminated. The law did not require that because I was not tenured at that point.

I found out, however, in an off-the-record conversation with the chairman of my department, that I was terminated because of my epilepsy.

Mr. Chairman, at worst, I only had two seizures a week, lasting a total of 40 seconds each, maximum. They were like daydreaming for a minute. I always went right back to my work with no problem after one of these episodes.

The college even had a letter from my doctor stating that even these small petit mal seizures were being treated and in no way posed any hazard to my students.

I might say furthermore that these records are now missing. I lost my job because of 80 seconds a week.

I thought this was wrong. I talked to an attorney who told me that the Government followed laws and regulations that ensured equal opportunity for all citizens. He told me that I should not file a formal lawsuit because I was covered by those laws.

So I went to an officer at the college who recommended that I file both a complaint with the Office of Civil Rights at the Department of Education and with the Office of Federal Contract Compliance at the Department of Labor. I did exactly what they instructed me to do.

Seven years later, on May 24th, 1984, OCR sent me a letter stating that, because of the Grove City decision, they did not have jurisdiction to pursue my case. The Government had established that DeKalb Community College received over a quarter of a million dollars in Federal funds for the 1976–77 school year, but they could not trace the funds directly to my job, as the Grove City decision required. That year the school system received almost 3 million dollars in federal funds.

I have always believed that the Government would prevent this type of situation from happening. But the Grove City decision has stopped the investigation of my complaint, an investigation that had gone on for seven years. The investigation ended, not because I was not discriminated against, but because they could not prove the Federal money went to my department.

My question is: Is this just?

I am here today so that other people with disabilities will not have to go through what I did. I was unemployed for six months. One year later, I found a teaching position in Bellville at a private school, Pinewood Christian Academy. I had to take a large pay cut. Overall, I have lost at least $61,901 in salary and benefits over the past eight years. The years 1984–1987 are not included in these figures. I now teach science at Reidsville High School and teach college courses through Brewton Parker College and South Georgia College in the evening.

I think I am a good teacher. I have always been proud of my Government, and I believed in the system. But at this point, the system has failed me, and it will continue to fail others like me until the Grove City decision is overturned.

I therefore urge you to pass the Civil Rights Restoration Act so that others like me will not have to face what I did.

Thank you very much.

The CHAIRMAN. Thank you very much.

Mr. Foss?

Mr. FOSS. Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify before you this morning.

My name is Richard Foss. I am 47 years old, married, and have four children.

I started to work for the Chicago Fire Department in 1966 when I was 26 years old. Both my father and my uncle have been firefighters, and this was the only profession I wanted to have. I spent two years on the waiting list before I was able to begin my training.

After I finished my training at the academy, I became a firefighter in 1966. In 1967 I was assigned to the busiest battalion in the City of Chicago. In 1973, I was promoted to the position of engineer. As an engineer, I was in charge of operating the fire engine and ensuring that there was sufficient water supply to the firefighters. I remained an engineer with the Chicago Fire Department until January 1984.

During the 18 years I worked for the Fire Department, I only missed about five days of work. I have fought thousands of fires during my career with the Fire Department. I always took a lot of pride in my work and the people I worked with. I think it takes a special kind of person to be a firefighter.

In January 1984, I fainted at the firehouse. I was not driving an engine. I had just finished a busy, 24-hour tour of duty and was getting ready to go home. I was taken by ambulance to a local hospital where they conducted some tests. They could not find out what had caused me to faint. Since this had happened to me once before when I was on vacation about nine months earlier, I wanted to get to the bottom of it.

I spent about three weeks in the hospital while more tests were performed. I was seen by two neurologists, two cardiologists, and my own internist. At first the doctors thought maybe I had a rhythm disturbance in my heart. But after extensive testing, they concluded that this was not the case. They thought perhaps I had a seizure disorder, but again my neurological tests were normal.

After the testing was completed, my doctors advised me to stay off work for six months and avoid driving. They prescribed some medication for me to prevent any further fainting episodes. I followed my doctors' advice and had no further fainting episodes.

I was ready to go back to work, and my doctors agreed with me. That is when my troubles began. The fire department was not willing to take me back to work. I got letters from my doctors which said that I could resume my duties with the fire department, and I submitted these letters to the fire department's medical director.

It became clear after several months that no matter what my doctors said, the fire department would not take me back to work. No one at the fire department ever examined me or took the trouble to talk with my doctors about my condition.

After my year's medical leave was up, I was told to apply for my disability pension. I was 44 years old with a wife and four teenage kids to support. There was no reason why I could not work except the fire department would not let me. I had not had a fainting episode since January 1984. I had to choose between going on welfare or taking my pension. I took the pension. Since that time, I have been getting my pension and working part-time as an independent craftsman.

I still wanted to go back to work at the fire department. So I hired a lawyer and filed suit in Federal court under Section 504 of the Rehabilitation Act. That was in February 1985. I still have not had a fainting episode, and I have not gotten my job back.

We got knocked out of the box in the district court because the judge said even though the fire department received Federal money, I was not involved in a program where the money was used. So I could not bring my claim in Federal court. As I said and the judge said, the fire department does get Federal funds. It gets block grant money which it uses to train emergency medical technicians and to help reduce its overall response time to 911 calls. It also gets Federal money to run its Office of Emergency Preparedness, which is in charge of drafting and implementing a disaster plan for the City of Chicago. The Office of Emergency Preparedness also assists the rest of the fire department in combatting large fires.

I worked for the fire department for 18 years, and the funds came directly to the fire department to help carry out its regular functions. If I cannot bring this action under Section 504 of the Rehabilitation Act, I do not know who could.

I have not been able to work for the fire department for over three years. There is nothing wrong with me, and I am fully capable of performing my former job. But I have not been able to even get a chance to prove my case, because we are still trying to show that I worked for a program receiving Federal funds.

I have been a working man all my life. All I have been trying to do is get back to work as a firefighter.

The CHAIRMAN. Thank you very much, Mr. Foss.

Ms. Bern?

Ms. BERN. My name is Arlene Bern, and I am currently employed at the Postal Service in Amarillo, Texas.

In 1980, while I was a freshman at West Texas State University in Canyon, Texas, I was one of six women who brought the class action lawsuit known as *Bennett* v. *West Texas State University*. The purpose of the lawsuit was to bring an end to the sex discrimination which existed in the intercollegiate athletics program at West Texas State.

While I was at W.T., I played on the women's volleyball team. Every single aspect of our athletics program suffered from sex discrimination. We did not have anything close to our proportional fair share of scholarships. We did not have a fair share of the money for travel, or for uniforms or for equipment.

The University's sports information office did the overwhelming majority of its work for the men's programs and not for us. Our coaching also reflected the inequality of our budgets. In every single way that programs can be measured or compared, ours was clearly inferior to the men's.

In our lawsuit, we never got the chance to present evidence of this sex discrimination to the court. The reason, simply put, was the Grove City decision of the Supreme Court.

Our university has buildings built with Federal money, and some of the buildings are used in ways that benefit the athletics programs. Each year, W.T. receives through its students nearly $1 million through Federal financial aid programs. The men's athletics programs employed student workers who were paid by the Federal work-study program. Federal financial aid is used to conserve and stretch athletic scholarship dollars. But because of Grove City, the door to the courthouse was closed to us.

I am not a lawyer, so Grove City is hard for me to understand. I do understand that W.T. benefits tremendously from Federal support, and I understand that the courts have told W.T. that it is free to discriminate against its women athletes.

I am out of school now, but I am here because I believe women athletes should not suffer the sex discrimination that I and my teammates did. You cannot change what happened to us, but you can make things different for women in the future.

Thank you.

The CHAIRMAN. Thank you. Very good.

Ms. Leier?

Ms. LEIER. My name is Lezlie Leier, and I am a sophomore student at West Texas State University in Canyon, Texas. I am 19 years old.

When I was a high school senior, I was named to the all-State tournament team in volleyball. Even though I was recognized as one of the best women's volleyball players in the State of Texas, I am receiving only a one-half scholarship at West Texas State.

Listening to Arlene who testified just before me, it seems clear to me that the sex discrimination she described as existing in W.T.'s athletics program in the early 1980s still exists in the program today.

At my school, women's volleyball does not have the amount of scholarships the men's sports have. The men's sports have the maximum allowable number of scholarships under NCAA Division II rules, but we do not. We come up short.

This affects the ability of some women students to even participate in volleyball and other athletics, and it hurts the people who do participate.

Our travel budget also is not proportionate to the men's. This year, we needed approximately $16,000 to $23,000 for travel to meet our schedule, but we only received $11,000. So we had to reduce the number of players who could travel, and the manner in which we travel is different in quality from that which exists in the men's sports programs.

For example, men's basketball, with a total team size close to ours, travels with three coaches, a manager, a sports information person, statisticians, trainers, and all players. We travel with one coach, trainer, and statistician, and our coach decides which players to leave behind.

Unlike the men, we do not have game dress sweats because our budget does not allow it. We do not have the glossy program books that the men have, and we generally practice late to accommodate the better practice times which are given to the men.

There are many other examples, but I hope this will help you see that sex discrimination continues to flourish in women's athletics.

The athletics program is a big part of our university life, but it is clear, from the perspective of a volleyball player, that our program gets second-class treatment.

Compared to the men's program, this second-class treatment makes us feel that in the eyes of our university, we are not as important. I believe that athletics in college is a very big part of my education. I have only two more years, and then my college life is behind me forever. Unless Congress acts soon to make Title IX clearly applicable to athletic programs like mine, college athletics will have been, for me, a second-class experience.

Once I graduate, no court or no law can give me a remedy for that.

Thank you.

The CHAIRMAN. Thank you all very much for excellent presentations. We just have a few questions.

Mr. Kicklighter, you mentioned a letter from your doctor which you gave to school authorities. I will include the letter in the record. But it includes this sentence: "The type of his seizure is not such that I would think would be dangerous with his working in a biology lab." It is signed by Dr. Fleming Jolly, dated 28 March, 1977, to the Acting Vice President Marvin Cole, DeKalb Community College.

What did the school people say when they read the letter? Did they say they did not believe it?

[The letter referred to follows:]

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Section of Neurological Surgery
George T. Tindall MD
Fleming L. Jolley MD
Nettleton S. Payne II MD
Alan S. Fleischer MD
Pediatric Neurosurgery
Mark S. O'Brien MD

March 28, 1977

Dr. Marvin Cole
Acting Vice President
South Campus
DeKalb Community College
Decatur, Georgia

Re: Jerry A. Kicklighter, Jr.

Dear Dr. Cole:

This gentleman has been under my medical attention since October of 1969 when as a student, he had his initial seizure apparently. He had been in an automobile accident either in 1965 or 1967. In that interval he has had a number of electroencephalograms which demonstrated mild abnormalities and epileptiform activity during light sleep.

Medication has been somewhat of a problem at times with the increased drowsiness that it had caused.

This gentleman's neurological examination has remained normal.

The type of his seizure is not such that I would think would be dangerous with his working in a biology lab.

Respectfully submitted,

Fleming Jolley
Fleming L. Jolley, M.D.

FLJ/ga

THE WOODRUFF MEDICAL CENTER

Mr. **Kicklighter**. I presume the letter—maybe they did, maybe they did not. They do not even have the letter in their possession, at least presently. My neurosurgeon sent the letter to Dr. Cole. He indicated to me the letter had been sent. The college administration knew I had the condition. But that letter as far as being on file, any file records relative to my epilepsy have been pulled by the administrative staff. Some records were pulled in my presence.

The **Chairman**. Do you mean you could not find the letter? It is not part of the file now?

Mr. **Kicklighter**. No, sir—in no way, form or fashion.

The **Chairman**. Where did it go? Do you have any idea? Did it just disappear?

Mr. **Kicklighter**. It disappeared into thin air. Of course, I had a xerox copy of the letter and all the other records as related to epilepsy. It is now in my possession, of course. I was fortunate that I at least made copies prior to the fact.

The **Chairman**. Well, at any rate, you filed a complaint with the Department of Education, and after more than seven years, they told you that they had no jurisdiction because of the Grove City decision; is that right?

Mr. **Kicklighter**. Yes, sir, that is the case.

The **Chairman**. We will make that a part of the record. This is the Department of Education, and it says here that basically, there is no jurisdiction because of the Grove City decision.

[The letter referred to follows:]

UNITED STATES DEPARTMENT OF EDUCATION

REGION IV
101 MARIETTA TOWER
ATLANTA, GEORGIA 30323

OFFICE FOR CIVIL RIGHTS

May 24, 1984

Mr. Jerry Kicklighter, Jr.
Post Office Box 242
Bellville, Georgia 30414

Dear Mr. Kicklighter:

Re: Kicklighter v. DeKalb Community College
Docket Number 04-77-0042

This letter refers to your complaint against DeKalb Community College. You alleged that the College failed to renew your teaching contract as instructor for the 1977-78 academic year because of your epileptic seizures in violation of Section 504 of the Rehabilitation Act of 1973. You also alleged that you did not receive a reason for the non-renewal, and to your knowledge, your performance evaluations were excellent.

As you know, your initial complaint was filed with this Office and the Office of Federal Contract Compliance Programs (OFCCP). This Office deferred its investigation to OFCCP. After the case was investigated by OFCCP a determination was made by that Agency that it lacked jurisdiction. It was then deferred to this Office.

In a recent decision, Grove City College v. Bell, Number 82-792 (S. Ct., February 28, 1984), the Supreme Court issued a ruling regarding scope of the jurisdictional requirements of Title IX of the Education Amendments of 1972. The Court held that the coverage of the statute is limited to the program or activity of the institution actually receiving Federal financial assistance, whether direct or indirect. In light of the Court's decision, we have determined that we do not have jurisdiction to investigate your complaint. Available data failed to establish that Federal financial aid is used in the department where you were employed. We are, therefore, closing our files on the case. A determination on the merits of your allegations has not been made.

The Freedom of Information Act 5 U.S.C. 552 requires that the Office for Civil Rights release this letter and other information about this case upon request by the public. In the event that OCR receives such a request, we will attempt to protect any information that identifies individuals and that may constitute an invasion of privacy.

Page 2 - Mr. Jerry Kicklighter, Jr.

This letter is intended to cover only those issues specifically outlined in this complaint. Upon request, OCR will provide copies of all correspondence sent to the institution subsequent to the issuance of this letter.

If you have questions regarding the above, please call Mr. Louis O. Bryson of my staff at (404) 221-2970.

Sincerely,

N Lamar Clements

for William H. Thomas
Director

The CHAIRMAN. Do you know how many American people have epilepsy?

Mr. KICKLIGHTER. No, sir, I do not.

The CHAIRMAN. Well, there are two million Americans who have epilepsy. And they ought to understand that unless we change this current law, those who are working are at risk of getting fired from their jobs, even though there is absolutely no medical reason for that to be the case. And that is one of the very important reasons why we are here this morning and why your testimony is of great value to us.

We hear during the course of the hearing from the Justice Department that there is no apparent need to try and deal with these problems, because the need is not there. Well, you have certainly responded to that question.

Mr. Foss, you mentioned some letters from your doctors. We will include those letters in the record. I will just read part of them.

> Since that time, he is neurologically well, with no history of further episodes. He takes his medication faithfully, and by history, I feel that since he has gone almost one year spell-free, that he is able to return to his previous activities.

I will include the various other doctors' evaluations.

Did you give all the letters to the fire department?

Mr. FOSS. Yes, sir, I did.

The CHAIRMAN. And they still would not let you go back to work?

Mr. FOSS. No, sir.

The CHAIRMAN. I think we will also put the judge's opinion in the record, the opinion that said that you could not even stay in the court with your case. It is called *Foss* v. *The City of Chicago,* dated 1 August 1986 and appears at Volume 640 Federal Supplement 1088.

Do you think that is a fair way to treat someone, Mr. Foss?

Mr. FOSS. No, Mr. Chairman, I do not believe so. The fire department gets Federal money. Firefighters are the fire department, and I do not see why they should not be covered by the Federal court if they have Federal money.

The CHAIRMAN. Ms. Bern, you described the Federal court decision throughout your case, and I am going to make that circuit court opinion a part of the record. The case is entitled *Bennett* v. *West Texas University* and can be found at Volume 799 Federal Supplement 2(d)155.

[NOTE.—Due to printing limitations, and in the interest of economy, the material referred to was retained in the files of the committee.]

The CHAIRMAN. Your particular sport was volleyball. Would you give a little more details of the differences between men's and women's sports programs.

Ms. BERN. Well, to start off with, gym time and practice and the weight training facilities, men would get first priority on them, and we would have to schedule our practice times around them. Also, my coach was her own secretary. Many times she was also our manager, she was the trainer. When we travelled, we did not have a statistician. Just whoever was sitting on the bench, we just took turns; that is who was designated as statistician.

Our uniform—we were clearly outdated in our uniform. And our sweats, we had to use our own personal sweats. We did not even match. We just had our own.

And the sports information, I do not even remember having a program for our games. They did not really help us at all to promote our games, but they did for the men.

The CHAIRMAN. Let me ask, Ms. Leier, you are also a volleyball player. Is anything different at the school today?

Ms. LEIER. Well, it has gotten a little better. We have gotten new gray sweats that we do not have to buy with our own money. And we still have just one coach.

The CHAIRMAN. But there is still a significant difference between the way they treat the men's and women's teams?

Ms. LEIER. Yes, definitely.

The CHAIRMAN. That difference still is the case today; is that correct?

Ms. LEIER. Yes.

The CHAIRMAN. And did you ever consider bringing a civil rights complaint?

Ms. LEIER. Well, I cannot because of the Grove City decision. I could not bring it up against West Texas.

The CHAIRMAN. Because you believe that what happened with Ms. Bern's case would cover you as a future student?

Ms. LEIER. Definitely, yes.

The CHAIRMAN. And that case got thrown out, is that right?

Ms. LEIER. Yes.

The CHAIRMAN. Okay. Senator Hatch?

Senator HATCH. Thank you. I am happy to have all of you here, and I hope that we can resolve some of these problems for you. The issue is not whether we should have a bill. Everybody has agreed that we should have a bill. Everybody wants to restore Title IX to whatever it was before the Grove City decision was rendered and even more. And the Administration, I and others have been willing to even go beyond what the law was back in 1984 when the Grove City bill came down. So I hope we can resolve this issue this year.

The reason it has been delayed the last three years is because we find that some of the language is so broadly drafted that nobody knows what it means, and in the process it may mean some things that are very, very detrimental to society and millions of people within society. So hopefully, and in good faith, we can work this year, and we will all get a bill that everybody can be proud of. We will resolve some of these problems, if not all of them, and go on from there.

But I appreciate having you here and listening to your testimony and want to tell you that and appreciate your courage in coming here and testifying before us.

The CHAIRMAN. We want to again thank you very much. I think that you represent scores, thousands, perhaps millions of Americans in different aspects of our system, and we are going to make every effort to restore the kinds of protections that existed prior to the Grove City decision.

I want to thank all of you very much for coming here and being with us today.

We will move to our next panel consisting of Rabbi David Saperstein, Director of the Religious Action Center for the Union of American Hebrew Congregations; Bishop Joseph Sullivan, United States Catholic Conference, and William Bentley Ball for the Association of Christian Schools International.

Bishop Sullivan, we welcome you and will start off with your testimony.

STATEMENTS OF BISHOP JOSEPH M. SULLIVAN, CHAIRMAN, COMMITTEE ON SOCIAL DEVELOPMENT AND WORLD PEACE, UNITED STATES CATHOLIC CONFERENCE, BROOKLYN, NY, ACCOMPANIED BY JOHN A. LIEKWEG, ASSOCIATE GENERAL COUNSEL; WILLIAM BENTLEY BALL, ESQUIRE, HARRISBURG, PA, ON BEHALF OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; AND RABBI DAVID SAPERSTEIN, DIRECTOR, RELIGIOUS ACTION CENTER, UNION OF AMERICAN HEBREW CONGREGATIONS, WASHINGTON, DC

Bishop SULLIVAN. We thank you very much, Senator Kennedy, for this opportunity to come again. I come with Counsel for the United States Catholic Conference, Mr. John Liekweg, who is part of our General Counsel's Office and is a lawyer, and who knows the details a lot better than I do.

We come somewhat with mixed feelings to this session. We have been part of the Leadership Conference on Civil Rights. We have been strong advocates for civil rights legislation. We would like to see the restricted parts of Grove City overturned, an extension, restoring it to a prior situation, broader interpretation, and yet we come with some major concerns about what we feel are consistent civil rights, civil rights not only for handicapped and the aged and the minorities and women in society, but also a major concern coming out of our tradition, how we ought to interpret it through civil law protections of human rights. And those rights, we believe, are not only for those who are able to work or go to school, but also even for the unborn.

We do not come here with an agenda which is trying to extend the abortion agenda. We fight that issue in many other quarters. We come here in some ways because we are concerned that without amendment, there will be an extension to activities which we feel will deny some opportunities for freedom of conscience and choice among institutions that will potentially be exposed to harassment if the regulations stay in place.

It is our important position, then, that we would like to see this bill passed. We believe if amended and let out on the floor in either house, passed with this amendment, particularly on the abortion question, we believe it would pass in the Congress. So we in some ways very much resent the notion that we are the ones who are tying up the civil rights legislation. It is neither our tradition nor is it our intent at the present time.

We are grateful in the amended legislation that you have taken care of our religious tenet provision. We believe that that adequately satisfies us. And we believe also that Catholic hospitals and colleges, higher educational institutions, will be making testimony.

It solves the problem that we presented to you in our testimony previously around the religious tenet provision.

We are still somewhat concerned, of course, about the separability issue. As you know, in the church structure that we have, we have both corporation souls, we also have many dioceses where bishops, even though there are separate corporations, parishes, various charitable and religious organizations and schools, bishops serve many times as presidents of those institutions, and we are concerned about how that could be interpreted. And while we are for the full extension to any institution that is either directly or indirectly in receipt of Federal funds must abide by, in a sense, the broader interpretations of an overturned Grove City case, nevertheless we feel that it is possible within a parish that might be guilty in a sense of discrimination that the whole diocese could be involved. So we would still like some attention to that issue.

We are for total coverage in the institution that is in receipt of funds. We are somewhat concerned when there are large institutions, 400 parishes in a diocese where one might be in a sense guilty of error and discrimination, that it would not in some ways apply to 399 other parishes or to the diocese itself.

So we come here, and we are asking again for support for the overturn of the Grove City restrictive language. We want to make clear that we feel that nevertheless with amendment, that Title IX will not be interpreted to require abortion coverage.

Secondly, we feel that the coverage should be confined to those units receiving directly Federal funds or indirectly, and we would hope that in the final legislation, that it would retain the religious tenet provision as you have amended it at the present time.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Bishop Sullivan and response to questions submitted by Senators Hatch and Humphrey follow:]

TESTIMONY FOR THE

UNITED STATES CATHOLIC CONFERENCE

on

THE CIVIL RIGHTS RESTORATION ACT OF 1987

S. 557

by

Most Reverend Joseph M. Sullivan

before the

Senate Committee on the Judiciary

April 1, 1987

I testify today on behalf of the United States Catholic Conference (USCC). The USCC is the public policy agency of the Catholic Bishops of the United States. I wish at the outset to express the appreciation of the Bishops for this opportunity to present their views on an issue of fundamental importance for American society--overcoming discrimination based on age, race, sex or handicap.

The Committee has before it a bill, S. 557, designed to address the problem created for civil rights enforcement by the Grove City v. Bell decision of the U. S. Supreme Court in 1984. The USCC finds the bill to be inadequate and in need of amendments. We note, however, that S. 557 broadens coverage under the various civil rights statutes. In this respect, it is consistent with the USCC's objectives. I will comment on the significance of this legislation, indicate the basic moral principles which shape the USCC position and then propose specific modifications which USCC believes are needed in S. 557.

I. THE SIGNIFICANCE OF THIS LEGISLATION

It is the position of the Catholic bishops that the protection and promotion of civil rights is a fundamental test of the justice of our society, and of fidelity to our own constitutional tradition. How we respect the basic civil rights of each person is not only a political but also a moral question of the highest importance.

The history of the civil rights movement and the impact of the Civil Rights Act of 1964 tell the story of how this nation came to see the interdependence of the best of our constitutional tradition and the imperatives of our religious traditions in the question of civil rights. Religious organizations were a major element in the civil rights history of the 1960s and I express the basic posture of the USCC when I say that we testify on S. 557 today because we want the Catholic Church to be a significant voice and a responsible institution in protecting and promoting civil rights in the 1980s and 1990s. I am here to reaffirm the vigorous support of the Catholic Bishops of the United States for strong and effective civil rights legislation. The prevention of discrimination was a moral issue in the 1960s. It is a moral issue today as well. The need to protect basic civil rights required the passage of strong legislation in the 1960s. Today those laws must be preserved and enhanced if the gains that we have made are not to be eroded.

During the last two decades, our society has made important strides toward eradicating many forms of discrimination. To a significant degree it was the enactment and enforcement of civil rights laws that contributed to this success. It is a precious part of our heritage--a moral, social, and political achievement that must not be weakened or allowed to regress.

Despite the gains that have been made, however, discrimination continues to be a serious problem in our society. Racial, sexual and other forms of discrimination are frequently less blatant and overt than they used to be. But the new, more subtle forms of discrimination are no less harmful to human dignity and human progress. They are no less morally offensive to the God who created us equal. It is imperative, therefore, that our society maintain and strengthen its efforts to eradicate discrimination based on race, sex, age, or handicap.

One of the most effective ways to reduce unjust discrimination is to use the power of the federal government to enforce a very basic principle--namely, that those institutions which receive federal funds ought not to discriminate. Thus Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 have been used to enforce this principle. As a result, these laws have been partially responsible for bringing about fundamental changes of enormous importance. For example, schools have been desegregated, handicapped people are being brought into the mainstream of American life, and women are making important progress toward equal opportunity in education and employment and full participation in our national life. This important progress must not be allowed to be weakened or eroded.

The decision of the U.S. Supreme Court in Grove City v. Bell threatens the effectiveness of the four civil rights statutes referred to above. The Grove City decision allows the possibility for institutions receiving federal funds to practice discrimination. The USCC finds this unacceptable and we support the objectives of S. 557 in seeking to guarantee that institutions receiving federal assistance will uphold the civil rights standards of this nation. We support the policy and enforcement of Title VI, Title IX, Section 504 and the Age Discrimination Act. Hence we support the objectives of legislation which will clarify and strengthen enforcement of these laws.

II. PRINCIPLES AND CONCERNS OF USCC POSITION

Our support for the objectives of S. 557 is rooted in basic Catholic moral teaching. We also have some specific concerns about this legislation which flow from both our moral teaching and our specific institutional structure as a church.

1. The basic moral principle which supports all of Catholic social teaching and which is the core of our position in this testimony is respect for the dignity of the human person. Catholic teaching asserts that every person is created in the image of God. Every person uniquely reflects the presence of God in the world. Unjust discrimination attacks the image of God in our midst.

2. Flowing from the dignity of the person is a spectrum of *human rights* through which human dignity is preserved and promoted in society. Authentic human rights are moral claims which each person can make because of his/her dignity. As the Catholic Bishops' Pastoral Letter on Racism put it: "God's word in Genesis announces that all men and women are created in God's image; not just *some* races and racial types, but *all* bear the imprint of the Creator and are enlivened by the breath of his one spirit."

3. Precisely because our rights are denied or fulfilled in society, the moral claims of human rights must be translated into civil rights, *i.e.*, rights protected by both the moral and the civil law. Catholic social teaching affirms the social nature of the person--we develop as human persons within a social context. Therefore the political and legal order of a society is not a purely technical question but one of the highest moral significance. The importance of legislation for civil rights is that it touches upon the moral quality of a society. The responsibility to protect and promote civil rights rests upon each person and every institution in society, but Catholic teaching asserts that the civil authority of the state has unique moral and legal responsibilities in protecting basic human rights. These unique responsibilities are exercised through civil law.

4. The moral and legal principles which move the Catholic bishops to support civil rights legislation also require us to

raise a particular objection to the implications of one dimension of S. 557. The regulations under Title IX, finalized in 1975, require that termination of pregnancy be treated the same as other disabilities in student and employee health and benefit programs. (Cf. 45 CFR, Sec. 86.40 and 86.57.) The effect of S. 557, if unamended, would be to maintain and extend these regulations to more activities than is presently the case. Precisely because we are testifying in support of civil rights, the Catholic Bishops want to reaffirm their opposition to including in any way the right to abortion as a civil right. On the contrary, it is necessary in this testimony to call attention to the fact that the right to life is the fundamental civil right and it applies to the unborn as well as to the rest of us.

5. Moving from moral principle to an issue of religious liberty in S. 557, the USCC must raise the question of the religious tenet provision of Title IX. The religious tenet provision was included in Title IX at the time of its enactment; it protects church educational institutions against conflicts between their religious beliefs and Title IX.

The USCC sees the religious tenet provision as an expression of the abiding American sensitivity to religious freedom and it is for us a fundamental requirement in this legislation. When we testified on this legislation in the last Congress we requested that the religious tenet provision be extended to ensure that the non-educational institutions would also be protected. As we read

S. 557 in its present form, the extension of the religious tenet provision beyond educational institutions has been made.

6. Another crucially important aspect of the legislation is the nature of the Catholic institutional structure as it would be affected by S. 557.

The USCC fully supports the principle that federal financial assistance should not be used to support discrimination. It is reasonable to require institutions in their entirety to bear the responsibilities and obligations imposed by the four statutes as a condition of receiving federal assistance. We are concerned, however, that in pursuing this desirable result S. 557 will sweep within the ambit of the four statutes institutions and subunits of churches which do not themselves receive any federal financial assistance. For example, under S. 557 all of the activities of a diocese could be subject to coverage under the four statutes if any part of the diocese receives federal assistance. To appreciate fully the potential expansive impact of S. 557 on churches, one need only consider that in the case of larger dioceses as many as four hundred or more individual parishes, and a variety of other agencies and institutions, would be required to comply with statutory and regulatory provisions even though many of those parishes and institutions do not receive any federal assistance at all.

For example, in the case of a diocese organized under a corporation sole structure, all of the parishes, as well as other unincorporated agencies or departments of the diocese, are considered to be a part of the larger single entity, the corporation sole. Therefore, under S. 557, all of the parishes and other diocesan activities subsumed under the corporation sole could be subject to the four statutes if any parish or other activity of the corporation sole receives federal assistance. Even in dioceses where separate incorporation is prevalent, as is the case in some dioceses, there is a real possibility that a diocese and its separately incorporated parishes, agencies, and institutions would be treated as a "combination" within the meaning of S. 557 because of the civil control the Diocesan Bishop can exercise over the separate corporations through his ex officio position as president, and his authority to appoint board members and to exercise veto authority in certain matters. Contributing further to this possibility is the authority of the Diocesan Bishop which exists under the canon law of the Church.

When considering diocesan structures it is important to bear in mind that parishes and other subunits of a diocese can exercise a significant degree of autonomy in their own operations, e.g., raising and use of operating funds, employment decisions, size and types of programs offered, and participation in state and federal programs. Thus, decisions of particular parishes or subunits of a diocese to receive federal assistance would trigger coverage for other parishes or subunits of the diocese which have elected not to participate in federal programs and receive no benefit from them.

To avoid extending coverage to church institutions and agencies that receive no federal assistance, we urge the Committee to adopt appropriate amendatory language which will ensure that those institutions which actually receive assistance are covered by the statutes, but which also will recognize and respect the operational integrity of individual institutions, parishes and other subordinate units of churches which do not receive any federal assistance. S. 557 accommodates the operations of individual agencies and departments of state and local governments. We are confident that appropriate language can be fashioned which will similarly accommodate the legitimate concerns of churches.

III. SUMMARY OF THE USCC POSITION ON S. 557

To summarize, the USCC comes before this Committee to support your efforts to assure the equitable and vigorous enforcement of the civil rights statutes amended by S. 557. The Bishops recognize the significance of the legislation you are considering and the moral and religious obligation the Church has to be a forceful advocate of civil rights within its own institutions and in society.

We are requesting that S. 557:

1. include an amendment to ensure that Title IX will not be interpreted as requiring abortion coverage in student, employee or other programs;
2. include an amendment to recognize, as S. 557 presently does for state and local governments, that institutional coverage be confined to those units of churches receiving federal funds either directly or indirectly; and
3. retain a religious tenet provision that corresponds to the full reach of Title IX as S. 557 does.

Inclusion of these would assure USCC's total support for S. 557, a bill which we believe has many positive dimensions.

IV. CONCLUSION

The Catholic Bishops of the United States want to strengthen the enforcement mechanism for civil rights laws. We find the objectives of S. 557 valuable and necessary goals to be realized. If the recommendations I have set forth in this testimony are included in S. 557, the USCC can give the bill its full support.

UNITED STATES CATHOLIC CONFERENCE
Department of Social Development and World Peace
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6820

Office of the Secretary

April 24, 1987

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are Bishop Joseph Sullivan's responses to the written questions submitted by Senators Hatch and Humphrey, following up on his April 1, 1987 testimony on S.557.

Bishop Sullivan is grateful to you for the opportunity to testify. Precisely because the United States Catholic Conference is strongly in support of the civil rights objectives of S.557, we hope that your Committee will address our concerns so that the United States Catholic Conference can fully support the Civil Rights Restoration Act.

Sincerely,

Bryan

Reverend J. Bryan Hehir
Secretary

Enclosure

cc: Most Reverend Joseph M. Sullivan

Bishop Joseph M. Sullivan's Responses to Questions Submitted Following His Testimony on S.557 on April 1, 1987

Questions of Senator Orrin Hatch

1. The religious tenet exception found in Title IX (20 U.S.C. 1681(a)(3)) as well as the religious tenet language in Section 4 of S.557, applies only to entities that are "controlled by" a religious organization. It is my understanding that this exception does not apply to many universities with a strong religious commitment, such as most Southern Baptist schools, because they are not actually "controlled" by the church with which they are affiliated. What is the status of most Catholic-oriented institutions such as Notre Dame and St. Mary's in Maryland? Are they protected by this exemption?

   We respectfully refer you to the testimony given on H.R.700 on March 27, 1985, before the House Committee on Education and Labor and the Judiciary Subcommittee on Civil and Constitutional Rights, by the Reverend William J. Byron, S.J., President of the Catholic University of America. Father Byron specifically addressed the "controlled" issue, in representing several groups, including the Association of Independent Colleges and Universities (NAICU), and the Association of Catholic Colleges and Universities (ACCU). We understand NAICU will very soon address the same issue in respect to S.557, in correspondence with the Committee Chairman. Concerning the impact on specific institutions, like Notre Dame and St. Mary's in Maryland, we suggest ACCU could provide you with that information.

2. Is it appropriate for the federal government to have the power to force those schools to adhere to federal rules and regulations that conflict with the particular policies of that religious mission? Do you find a constitutional problem here in that these regulations may be impeding the free exercise of the religion of these missions?

   It is not necessary for the federal government to compel schools or other institutions to comply with requirements that conflict with the religious mission of the institution. To the extent federal regulations would require institutions to act contrary to their religious beliefs, there would be a burden on the free exercise of religion.

3. If an educational institution receives federal financial assistance, would the diversity of religious organizations which currently may use campus facilities be limited upon enactment of S.557? For example, would the Knights of Columbus' male-only policy prevent its several hundred campus chapters from receiving equal and legitimate status under Title IX, thus requiring schools receiving federal monies either to expel them from campus or lose funding?

   This question is best addressed by the Association of Independent Colleges and Universities. Your specific example of the possible impact on the Knights of Columbus, is a matter of deep concern to them and I suggest you contact their Washington representative, Leonard J. Henzke, Jr., in the law firm of Lehrfeld and Henzke, and in addition, review Mr. Henzke's letter to the Judiciary Committee dated January 8, 1985.

4. With regard to the scope of coverage under S.557, does receipt of federal financial assistance, such as school lunch monies by a particular parish, trigger coverage for the entire diocese? Is this true even if the other parishes within that diocese have avoided participating in federal programs?

   We are concerned that under S.557 all of the activities of a diocese could be subject to coverage under the four statutes if any part of the diocese participates in a federal program, for example, a parish elementary school participating in a program for the homeless. This could be true even if other parishes and subunits of the diocese have decided not to participate in any federal programs. The USCC believes that the "Institutional Separability" Amendment we have proposed would clarify the scope of S.557 regarding diocesan activities and institutions.

5. Many critics of the amendments proposed by the Catholic Conference argue that these amendments are not germane to legislation overturning the Grove City decision. How do you answer this charge?

The amendments proposed by the Conference are certainly germane to the legislation. S.557 would extend coverage under the four statutes and their implementing regulations to more activities of institutions than is presently the case. The Conference's amendments relate to requirements under the present regulations, e.g., Title IX, and basic coverage questions. These issues are directly related to S.557 which would extend the reach of the four statutes and their implementing regulations.

Questions of Senator Gordon Humphrey

1. Is it your view that S.557 could result in every parish in some Catholic dioceses being covered in full by the four statutes in question if the diocese is incorporated as a corporation sole and if any program within the diocese received some form of federal assistance?

   Yes. Even in dioceses where separate incorporation is prevalent, as is the case in some dioceses, there is a real possibility that a diocese and its separately-incorporated parishes, agencies, and institutions could be treated as a "combination" within the meaning of S.557 because of the relationships that exist between the dioceses and those entities. Again, the USCC believes its amendment on "Institutional Separability" would meet our concerns.

   A. If this interpretation is correct, then wouldn't literally thousands of parishes that don't receive any federal assistance themselves become subject to the regulatory requirements of these four statutes?

      Under S.557, parishes which do not receive any federal financial assistance could become subject to the four statutes and their implementing regulations.

   B. Were individual parishes that did not receive any federal assistance themselves covered by these four civil rights statutes before, either before or after the Grove City decision? Are such non-assisted parishes covered now?

Parishes which do not receive any federal financial assistance are not now covered under the four statutes. The Conference is not aware of any instances before the Grove City decision in which such parishes were subjected to coverage.

C. But this bill, S.557, could subject these thousands of church parishes to this regulatory coverage for the first time, is that correct?

It is fair to say that under S.557 a significant number of parishes and other agencies and institutions of the Church could be subject to coverage for the first time.

D. Are you aware of any evidence, complaints, etc., indicating that significant numbers of Catholic parishes have engaged in widespread discrimination on the basis of race, sex, age, or handicap?

Frankly, we are unaware of any such evidence. In fact, a key Congressional supporter of the Civil Rights Restoration Act, told Conference representatives that efforts over several years by certain groups to determine if such discrimination is occurring has revealed none.

2. Is there concern that the expanded regulatory coverage likely to follow from S.557, in its present form, could entail a substantial financial and manpower burden on the resources of the parishes and other diocesan programs?

It is reasonable to require institutions and programs that receive federal financial assistance to bear the responsibilities and obligations, e.g., recordkeeping, self-evaluations, adoption of grievance procedures imposed by the four statutes. Our concern is that under S.557 these obligations will be placed on institutions and programs which do not receive any federal assistance.

The CHAIRMAN. Mr. Ball?

Mr. BALL. Mr. Chairman, I represent the Association of Christian Schools International, which is an organization of 2,300 evangelical Christian schools throughout the United States, embracing some 390,000 students.

In this brief testimony, Mr. Chairman, I am going to try to make just two points. The first concerns what we believe to be mechanical failures of this bill, serious mechanical problems with the bill, regardless of what one's interests or motivations might be, the fact that the bill is certain to encounter very, very serious administrative and ultimately court problems.

We would like to submit an addendum to our testimony which will bring out in more detail those mechanical problems that we have not sought to spell out, and in the course of that, to resubmit this testimony if we may, Mr. Chairman.

The CHAIRMAN. Yes.

Mr. BALL. As just one example of the mechanical problem—and then I want to get on to the principal problem which concerns religious aspects of this bill—the present paragraph 3(a)(i) of the new section 908 at page 3, line 15, uses the term, "as a whole," so that the meaning of 908 as you would follow it out, is that "For the purposes of this title, 'program or activity' means all of the operations of a corporation, a private organization, nonprofit, church, or whatever, if assistance is extended to the corporation 'as a whole'." What is one to understand by "as a whole"?

If, for example, an entity—be it a nonprofit, a church, or whatever—has branches at Akron, Dayton, Rochester, and Albany, and assistance is extended to the branches at Akron and Dayton, is the entity then not a "program or activity"—or is it? If the answer is yes, then we raise the question what reason there would be for omitting the "as a whole" language from the very next paragraph 3(a)(ii) which deals with hospitals, health care organizations, and so on.

In light of that inquiry, we naturally ask what is meant by "the entire plant" in (3)(B).

Then, in paragraph (3)(B), we speak also of "other comparable geographically separate facility." "Facility" of what? "Comparable" to what?

I take it that you are not intending this legislation to have but a short and showy life in 1987-88, but that you want this legislation to have long life as permanent law. But push it through today, with your faces averted from its mechanical defects, and you will soon see, I believe, that the courts and in particular the Supreme Court, will look with devastating scrutiny at particular words, phrases and paragraphs which threaten to make shambles of all the hopes which you repose in this legislation.

I really venture to say, if it is not overly dramatic to say so, that if this present bill, with its present language, were to be tested in a Supreme Court of four Justice Brennans and five Justice Marshalls, it would have a very precarious life. That is because I think it is very, very badly drafted.

Coming now to the more important question, from our point of view, I take it that if this Committee had before it a bill which could have profound adverse effects on freedom of speech or the press, you would certainly amend it to protect those freedoms.

But if you felt that the public necessity for your bill did require some limitation of freedom of speech and the press, you would then be scrupulously careful to employ the narrowest, sharpest and clearest language possible to express that limitation. You would not dream of leaving the precious liberties of freedom of speech or the press to chance and hazard due to loose language.

But freedom of religion is also one of the five freedoms protected by the First Amendment, and I know you cannot desire to enact legislation which would treat freedom of religion in a less exacting way than it would treat freedom of speech or press or assembly or petition.

Let me at once say, then, that S. 557 appears to contain, but it is not clear, a possible improvement over Civil Rights Restoration Acts introduced prior to 1986. I refer to its religious exception amendment to Title IX which, Senator, appears to me to boil down to the following. While "program or activity" means all of the operations of any college or private school, any part of which received Federal financial assistance, no operation of a college or school controlled by a religious organization is considered a "program or activity" if applying Title IX's prohibition of sex discrimination to that operation would be inconsistent with the religious tenets of that organization.

The point is that the term "operation" is very broad. It appears to cover any activity or policy of an entity. This bill, therefore, appears to accept every activity or policy of a religious college or a religious school.

But I respectfully request that that reading that I have just given, based upon the word "operations", to Senate Bill 557 be the subject of colloquy in debates over the bill in order that, if the bill is enacted, religious bodies will have complete assurance that the Act is thus protective of religious liberty.

Reference has been made to the "tenets" exception in the bill. We do not find this satisfactory; it never was satisfactory in Title IX, because it expresses a rather naive concept of religion. In a number of major religious liberty decisions by the Supreme Court of the United States, an established policy or practice was not found in the formal langauge of some black letter "tenet". In *Wisconsin* v. *Yoder,* the Amish case, a landmark religious liberty case decided by the Supreme Court, no "tenet" was found. Instead, at stake was the immemorial practice of a faith community, based upon its religious motivations, to respecting the lives of its young people. And so with the NLRB cases involving the Catholic schools.

It is to be hoped that amendatory language such as the following, then, might be adopted, which would provide, if you retain the "operations" language, as follows: that "Section 9 shall not apply to any education program or activity which is an integral part of the religious mission of a church or which, although not part of such mission, is religious in purpose and character and for which application of this subsection would not be consistent with the religious tenets, convictions, practices or ministry of such program or activity."

The CHAIRMAN. Mr. Ball, we will give you another couple of minutes to conclude.

Mr. BALL. Thank you. I am most grateful, Senator.

Other problems for religious bodies are presented by this bill, Mr. Chairman. The most important of these is perhaps the most important question raised by 557. I beg you to face it and address it in your debates so there can be no subsequent dispute over what you intend.

Section 2 sets forth the findings of the Congress. Section 2(2) states one of these findings to be as follows: "Legislative action is necessary to restore the prior consistent and long-standing Executive Branch interpretation and broad, institution-wide application of those laws as previously administered."

Let me now come to the question. Does that finding mean that the Congress would now affirm, without reservation or qualification, every item of earlier administrative interpretation of, for example, Title IX, to be an operative part of this statute? If so, I beg you to consider the reach of your term, "Executive Branch interpretation". That encompasses regulations, guidelines, opinions of counsel, even letters answering inquiries. I assume you do not mean that.

Nevertheless, it needs to be unmistakably made clear in the evolution of this bill on the floor of the Congress.

We are concerned about what the sponsors mean in Title IX by the words "on the basis of sex". Should S. 557's religious exemption provision be very narrowly construed, basic rights of religious bodies to differentiate on the basis of sex could be impaired by the new Act. An ACSI school, one of our schools, for example, which has one student receiving Government aid to the blind, and which school is operated by a church, could be prohibited by its religious beliefs from hiring a homosexual, or possibly from hiring a male to supervise certain activities of female students. Do the sponsors say that S. 557 if enacted into law would render such refusal to hire unlawful?

The CHAIRMAN. We will have to recess briefly; that is the final call for a vote.

[The prepared statement of Mr. Ball and responses to questions submitted by Senator Hatch follow:]

STATEMENT OF
WILLIAM BENTLEY BALL
ON BEHALF OF
ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL (ACSI)
TO
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
RE S. 557 ("CIVIL RIGHTS RESTORATION ACT OF 1987")
APRIL 3, 1987*

I am William Bentley Ball, partner in the law firm of Ball, Skelly, Murren & Connell, Harrisburg, Pennsylvania. I testify on behalf of Association of Christian Schools International (ACSI). ACSI is an organization of 2,300 evangelical Christian educational institutions throughout the United States (including 126 colleges), embracing 390,000 students.

ACSI has a long record of opposition to discrimination, even requiring its school administrators to sign a racial nondiscrimination pledge annually as a condition of membership.

I come before you also as a constitutional lawyer who has conducted First Amendment litigation in the courts of twenty-two states and has appeared in many such cases before the Supreme Court. I have also written and lectured extensively on constitutional topics. We appreciate the Committee's willingness to hear this testimony today.

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* With the permission of the Committee chairman, Senator Kennedy, at the April 1, 1987 hearing, the written testimony submitted by ACSI on that occasion has been withdrawn and is replaced by this amplified written statement dated April 3, 1987.

In this brief testimony, I will make now but two points.

I. THE BILL IS TOO LOOSELY DRAFTED EVEN TO ACHIEVE THE SPONSORS' AIMS.

My first point is one which should be of the highest interest to the sponsors of this bill. You want this bill to reverse the Grove City decision. It is very doubtful that your bill will achieve this or serve the cause of expanding civil rights because of what I can best call "mechanical failures." The bill is simply too loosely drafted to stand any chance of avoiding multiple and conflicting interpretations by the public, by agencies and by courts on key provisions. It badly needs tightening up and defining of terms. The bill has serious structural defects which - all apart from any consideration of one's views on the merit or philosophy of this bill - demand your attention before enactment. For example:

Paragraph (3)(A)(i) of new Sec. 908, at page 3, line 15, uses the term, "as a whole." The meaning of that paragraph, as we follow down from the opening sentence of Sec. 908, seems to be:

> For the purposes of this title, "program or activity" or "program" means all of the operations of "a private organization"
>
> > . . .if assistance is extended to such . . . private organization "as a whole."

What is one to understand by "as a whole"? If Entity X has branches at Akron, Dayton, Rochester and Albany, and assistance is extended to the branches at Akron and Dayton, is or is not Entity X then a "program or activity"? One can argue either way. One can say that it is not a "program or activity" because the assistance went only to the Akron and Dayton branches - i.e., not to Entity X "as a whole." But one can argue that Entity X is a "program or activity" because (3)(A) speaks of "an entire . . . private organization" and (3)(A)(i) speaks of "such" (i.e., "entire") private organizaiton (so that "as a whole" is simply surplusage).

If Entity X is a "program or activity", why does the text, for example, omit the "as a whole" language from the very next paragraph, (3)(A)(ii) which deals with hospitals, health care organizations, etc.?

Then comes Paragraph (3)(B), which speaks of "the entire plant" of a "private organization." Are Entity X's four branches "the entire plant"? What is "plant"? What is a "private organization"? Churches are "private organizations"? Do they have "plants"?

New complexities are now cranked into the growingly inscrutable text. Paragraph (3)(B) not only speaks of "an entire plant," it alternatively speaks of

> ". . . or other comparable, geographically separate facility . . . in the case of any other . . . private organization . . ."

"Comparable" to what? "Geographically separate" from what? What is a "facility"? What possibly can be intended by this incomprehensible language?

Without venturing impertinence, one can but ask each sponsor of S. 557:

Please take this text home with you. Take a paper pad and pencil and try to outline the exact meaning of the text in order to be able to explain it tomorrow to a group of, say, good, bright college juniors. You will then discover that you face an unintelligible text, firmly resistant to analysis - even to paraphrasing.

The sponsor may be asked:

- Do you know what is meant by "other school system"? (Page 3, line 9). The context (Section 908(2)(B)) appears to be public ("local education agency", "system of vocational education" - usually thought of as public). But is "public" school system what you intend? Is a private religious association of schools a "school system"? (Note: schools of churches of congregational polity, and Catholic parish schools, are not parts of a "system". Do you want them to have to go through legal proceedings in order to establish that point - when you could have made clear - now - what you do or do not intend?) And are seminaries "vocational" schools"?

- What do you mean in Paragraph (3)(A)(ii) (page 3, line 17) by a "private organization" which is "principally engaged in the business of providing education"?

(a) Does not that same phrase ("providing education") extend beyond schools? You don't speak of schools, in this subparagraph (ii); hence you apparently mean any educational endeavor. The question then is, how much do you intend that to cover? Do you think it important that the public would be let in on this? (b) You do not define "education". All Christian churches have evangelism as a primary function. It is irrelevant for you to say that you don't intend that form of education to be covered, because you have neglected or refused to define or limit the term "education". Again: will churches be forced to undergo legal proceedings conducted by an administrator, who, in good faith, used your blank check to the full extent you have allowed? (c) Why do you speak of the "business" of providing education? Is this merely a careless use of the term "business" (as synonymous with "activity"), or do you mean "for profit"?

- Do you intend seminaries to be covered?
- Ministerial associations?
- Convents?
- Monasteries?
- Yeshivas?
- Mission centers?
- The text is rendered only more enigmatic by Section 908(4), which speaks of "any combination comprised of two or more entities described in paragraphs (1), (2) or (3). Had a junior in our law firm, having been asked to draft a statute, come up with any catchall such as that, he

would be in danger of losing his job. That kind of drafting refuses to engage in the hard labor of thinking out complex concepts and reducing them to intelligible words and sentences. This catchall of subsection (4) ducks that responsibility and loads onto the public, the agencies and the courts the costly job of trying to figure out what could conceivably have been intended by this generalizing.

What, one must ask the sponsor, do you say it means? But, before answering, go back to that paper pad, take (4), (3), (2) and (1) and begin to figure out the possible "combinations" to which (4) refers. Once into that task, you are into a labyrith reaching to legalistic infinity.

- Section 2 sets forth the "Findings of Congress." Section 2(2) states one of these findings to be as follows:

> "(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."

Does that finding mean that the Congress now affirms, without reservation or qualification, every item of earlier administrative interpretation of, for example, Title IX, to be an operative part of this statute? If so, I beg you to consider the reach of your term, "executive branch interpretation." That encompasses regulations, guidelines, opinions of counsel, even letters answering inquiries. Is that what you mean? Such an interpretation of your finding would also mean that earlier Congresses intended to give administrative agencies a blank check in applying civil rights acts, with freedom to make up their definition of terms. That would have been not only a truly unconstitutional delegation of legislative power, but an egregious neglect, by the Congress, to write a statute whose plain meaning can be found in its plain text.

I take it that you are not intending this legislation to have but a short and showy life in 1987-88; that you want this legislation to have long life, as permanent law. But push it through today, with your faces averted from its defects, and you will soon see that the courts (and in particular the Supreme Court) will look with devastating scrutiny at particular words, phrases and paragraphs and threaten to make a shambles of all the hopes which you repose in this legislation.

These serious matters should not be palmed off to the courts. It is the Congress which makes the laws, and the Congress should not leave it to the courts to delve for the meanings which the Congress, had it but taken pains, could have made ummistakably clear. It is not for the courts, the agencies or the citizenry to be forced to face a plague of questions with which the face of this bill is pockmarked. It is rather for the Congress to so speak that major questions will by and large be avoided.

- Do you know why educational activity is scattered, in various parts of the bill, with varying terminology?

Paragraph 2(A) (starting at page 3, line 3 of the bill) covers "a college, university, or other post-secondary institution, or a public system of higher education." Paragraph 3(A)(ii) (starting at page 3, line 16 of the bill) covers corporations and private organizations which are "principally engaged in the business of providing education." This would appear to cover the private colleges already covered. But indeed, a third use crops up: Paragraph 2(B), (at page 3, line 9) speaks of "or other school systems."

Why the duplication? The courts will believe that, since you legislated thrice on educational institutions, you must have assigned different meanings to each use.

Permit me now to turn to ACSI's deep concern over substantive aspects of the bill relating to religious liberty.

II. THE BILL THREATENS RELIGIOUS FREEDOM. IT CAN BE AMENDED TO PROTECT RELIGIOUS FREEDOM.

I take it, that if this Committee had before it a bill which could have profound adverse effects upon the exercise of freedom of speech or the press, you would certainly amend it to protect that freedom. But if you felt that the public necessity for your bill did require some limitation of freedom of speech or the press, you would then be scrupulously careful to employ the narrowest, sharpest and clearest language to express that limitation. You would not dream of leaving the precious liberties of freedom of speech or the press to chance and hazard due to loose language.

But freedom of religion is also one of the five freedoms sealed into the First Amendment. Indeed it is the first of those freedoms listed. I know that you cannot desire to enact legislation which would treat freedom of religion in a less exacting way than it would treat freedom of speech - or of press, or of assembly, or of petition.

S. 557 contains a notable, but unexplained difference with the existing language of Title IX. I refer to its religious exception amendment (see Page 4, lines 4-8) to Title IX:

> ". . . except that such term ["program or activity"] does not include any operation of an entity which is controlled by a religious organization if the application of section 901 would not be consistent with the religious tenets of such organization."

That language (centered on the word, "operation") appears to boil down to the following:

> While "program or activity" means all of the operations of any entity whatever controlled by a religious institution, any part of which received federal financial assistance, no operation of an entity controlled by a religious organization is considered a "program or activity" if applying Title IX's prohibition of sex discrimination to that operation would be inconsistent with the religious tenets of that organization.

The term "operation" is very broad. It appears to cover any activity or policy of an entity. This bill, therefore, appears to except every activity or policy of a religious school or religious college, which school or college is controlled by a religious organization whose religious tenets require sexual differentiation in that activity (regardless of whether the institution is directly or indirectly federally aided).

Title IX's present text (20 U.S.C. §1681(a)(3)) states:

> "(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."

S. 557 does not repeal that section. But it adds the religious exception which I have quoted previously. There would thus be two religious exceptions, one relating to an "educational institution" and one relating to "any operation of an entity controlled by a religious organization" - any kind of entity.

Since that is what you have now provided in S. 557, one must ask: why? What do you see to be the effects of this double, but partially duplicative, exemption? Does S. 557's amendment, in your view, broaden or narrow the reach of Title IX with respect to religious organizations?

Naturally, religious organizations, once aware of this remarkable drafting, will feel put at hazard. They will wonder whether the Congress has simply dealt carelessly with what, to most people, is a precious and fundamental liberty.

I respectfully urge that this reading of S. 557 be the subject of colloquy in the debates upon the bill, in order that, if the bill is enacted, religious bodies will have complete assurance that the act is thus protective of this basic liberty.

But both the amendment and present Title IX fall short of what is needed.

The continued employment of the term "religious tenets" perpetuates a failure found in the existing Title IX - and damaging (needlessly so) to religious liberty. In several major religious liberty cases an established religious policy or practice could not be found in the formal language of one or another "tenet." In Wisconsin v. Yoder, 406 U.S. 205 (1972), a landmark religious liberty case decided by the Supreme Court in 1972, no "tenet" whatever was involved. Instead, at stake was the immemorial practice of a faith community, based upon religious motivations, respecting the lives of its young people. When NLRB attempted to impose its jurisdiction upon Catholic schools, no Catholic "tenet" was violated. Yet the religious liberties of Catholic schools were threatened with outrageous violation by the federal government (McCormick v. Hirsch, 460 F.Supp. 1337 (M.D.Pa. 1978)). The confining term, "tenet," leaves broad areas of religious life unprotected, one of the most significant of these being the religious ministry or organism - the faith community. The Supreme Court has long recognized that freedom of the religious organism itself is constitutionally protected, quite apart from any freedom to observe a particular "tenet." Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 448 (1969).*

It is to be hoped that amendatory language such as the following might be adopted which would provide that Section 901:

> ". . . shall not apply to any program or activity of an entity which is an integral part of the religious mission of a church, or which, although not part of such mission, is religious in purpose and character, and where application of this subsection would not be consistent with the religious tenets, convictions, practices or ministry of such entity."

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* I cannot but point to an extremely disturbing matter related to what appears to be a compulsive proclivity of administrative agencies to deal with religion as though it were but a species of secular activity. The NLRB in the parochial school cases (see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)), the Secretary of Labor in the unemployment compensation cases (see St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981)), and a number of other federal agencies have demonstrated this. One of the great reasons for strong protective language in statutes potentially affecting religion is the intolerable burden which may be visited upon a religious body of limited resources while in the toils of an agency blind to all but its own narrow area of "expertise" and before the First Amendment claim can be aired in court.

I have no doubt that the Congress in enacting Title IX did indeed desire to protect religious liberty and that it conceived that the exemption in §901(3) did exactly that. Nothing that I have found in the legislative history of Title IX indicates that there had been any information presented, or any real focus upon, the more meaningful conception of religious liberty signified by the term, "ministry", "conviction" and "practice."

It should be stressed that such an exemptive provision, similarly to the present Title IX exemption, speaks for itself. Completely unwarranted and ultra vires is the present regulation of the Office of Civil Rights which seeks to impose on religious institutions a duty to apply to the Office for the exemption already granted by the Congress. Section 106.12(b) unaccountably states:

> "(b) Exemption. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifiying the provisions of this part which conflict with a specific tenet of the religious organization."

34 CFR §106.12(b). This administrative contrivance is a violation of constitutional liberty, because it would, for example, require a church, a church-school, a seminary, a convent, etc., to furnish a secular agency of government a statement of religious doctrine as a condition for differentiation (on account of doctrine) on account of sex.

While this is unacceptable constitutionally, it is made worse by the necessary implication that the governmental agency must pass upon the doctrinal statement (else why require it to be submitted?). What makes more arbitrary and obnoxious this process of requiring religious bodies to submit professions of faith to government are the exemptions which are at once statutorily given to

- military educational institutions
- merchant marine training institutions
- YMCA
- Girl Scouts, Boy Scouts
- Camp Fire Girls.

Since the Office of Civil Rights has chosen to engraft upon Title IX its home-made requirement of an invalid religious exemption process, the Congress ought probably now make perfectly clear that, when it declares religious exemption, it does not imply any power in the unelected administrative agencies to dream up their own add-ons as though setting national policy.

Related to this, of course, are the regulations entitled "Prohibitions relating to marital or parental status" (34 CFR §106.21(c)). Christian schools, exempt both by the present Title IX and S 557, will continue to select students, faculty, and other employees strictly according to Scriptural standards, differentiating on the basis of sex where those standards so require. They will continue to refuse to conform to any requirement of government that they contradict the laws of God respecting fornication, adultery, homosexuality and abortion, and they will refuse to seek governmental permission to obey those laws. Constitutionally they are protected in this. But the Congress should seize the occasion of this bill to remove any basis for the pretensions of administrative agencies that they may entangle the exemptions in their own processes.

May I respectfully urge that two other questions (of very great moral and religious concern) be answered either through appropriate amendment or through unmistakably clear declaration on the floor.

What do the sponsors say that the term, in Title IX, "on the basis of sex," means? Should S. 557's religious exemption provision be very narrowly construed, basic rights of religious bodies to differentiate on the basis of sex could be impaired by the new act. An ACCU school, for example, which has one student receiving government aid to the blind and which school is not operated by a church, is prohibited by its religious beliefs from hiring a homosexual, or possibly from hiring a male to supervise certain activities of female students. Do the sponsors say that S. 557, if enacted into law, would render such refusal to hire unlawful?

Again, the Supreme Court's recent decision in the Arline case* may have the consequence that an individual infected with the AIDS virus could not be discriminated against on the basis of handicap in violation of Section 504 of the Rehabilitation Act of 1973. An ACSI school, solely on the basis of its religious beliefs, would be obligated to refuse to hire an individual affected with AIDS if it had reason to believe that the disease was acquired through homosexual or other sexual conduct deemed offensive to Christian morality, even if the individual were qualified to teach and could perform the job and do so without infecting others. Would the sponsors consider that refusal to be violative of the Rehabilitation Act? Note: S. 557 provides no religious exemption from the Rehabilitation Act amendments.

In conclusion, ACSI joins with the many organizations of great repute which have come before you to express profound concern over aspects of this bill. We beg you to take heed of the immensely affirmative and fruitful role by which religious institutions contribute to our society. Few of them are really federally aided. No ACSI schools are so aided, or in any common sense view, recipients "federal financial assistance." Therefore, do not seek to regulate the religious sector further. Help it - help it to help the nation - by leaving it free.

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* School Board of Nassau County v. Arline, 55 U.S.L.W. 4245 (U.S. , March 3, 1987

Questions for Mr. Ball

1. The religious tenet exception found in Title IX(20 U.S.C. 1681(a) (3)) as well as the religious tenet language in Sec. 4 of S. 557, applies only to entities that are "controlled by" a religious organization. It is my understanding that this exemption does not apply to many universities with a strong religious commitment -- such as most Southern Baptist schools -- because they are not actually "controlled" by the church with which they are affiliated. What is the status of most Catholic-oriented institutions such as Notre Dame and St. Mary's in Maryland? Are the protected by this exemption?

2. Given that many schools motivated by a religious mission are not literally "controlled by" a church and are therefore unprotected by these exemptions, in your view, is it appropriate for the federal government to have the power to force those schools to adhere to federal rules and regulations that conflict with the particular policies of that religious mission? Do you find a constitutional problem here in that these regulations may be impeding the free exercise of the religion of these missions?

3. If an educational institution receives federal financial assistance, would the diversity of religious organizations which currently may use campus facilities be limited upon enactment of S. 557? For example, would the Knights of Columbus' male-only policy prevent its several hundred campus chapters from receiving equal and legitimate status under Title IX, thus requiring schools receiving federal monies either to expel them from campus or lose funding?

4. With regard to the scope of coverage under S. 557, does receipt of federal financial assistance, such as school lunch monies by a particular parish, trigger coverage for the entire diocese? Is this true even if the other parishes within that diocese have avoided participating in federal programs?

5. Many critics of the amendments proposed by the Catholic Conference argue that these amendments are not germane to legislation overturning the Grove City decision. How do you answer this charge?

6. Should inclusion of the language found on page 2, lines 13 through 16, be interpreted as codifying, approving or sanctioning

all existing federal regulations, rules and opinions interpreting the four laws addressed in S. 557?

7. Please explain the meaning of the phrase, "and each other entity," which is found in paragraph (1)(B) of S. 557?

8. If recipients of federal funds awarded to the state agency use those funds to purchase goods or services, would the providers of such goods or services be an entity subject to federal regulation under the definition of program or activity found in S. 557? If your answer is yes, please explain how they would be covered.

9. What is the correct interpretation of subsection (4) which refers to "any combination comprised of two or more of the entities described in paragraph (1), (2), or (3)?

10. Do you believe an entire church, and I use the word in the broad sense - for example, the Catholic Church, would be a "combination" as the word is used in section 4 if two or more parishes are recipients of federal financial assistance?

11. Please explain who is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

12. In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S. 557 excluded from coverage under the four statutes addressed in legislation?

13. Would you please explain whether hospitals affiliated with a religious school could choose not to provide abortions under the law prior to the Grove City decision.

14. Would your answer to the previous question be the same upon enactment of S. 557?

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TELEPHONE
AREA CODE 717
232-8731

April 15, 1987

Hon. Edward M. Kennedy
Chairman
Committee on Labor & Human
Resources
Senate of the United States
315 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Civil Rights Restoration Act
(S. 557)

Dear Senator Kennedy:

The enclosed is in response to your letter to me dated April 10, 1987, respecting written questions on S. 557, forwarded at Senator Hatch's request.

Very truly yours,

William B. Ball

WBB:dh
Enc.

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232-8731

ANSWERS BY MR. BALL

1. It is true that the religious exemptions contained in Title IX (20 U.S.C. §1681(a)(3)), as well as the somewhat duplicative language of Section 4 of S. 557, do not apply to entities not "controlled by a religious organization." "Religious organization" obviously includes churches. But in fact the term is more comprehensive than "churches." Further, the clear intent of the language is that no religious entity is, of and by itself, exempt, but only one which is subject to the outside control of some other religious entity. Otherwise there would be no reason to have the phrase, "controlled by a religious organization," and the statute would then simply read that, for example, churches and their ministries are exempt and all other entities which are religious in purpose and character, where application of the Title IX restrictions would not be consistent with the religious tenets, convictions, practices or ministry of such entity. My testimony before the Committee on April 1 recommended amendatory language such as that which would provide that Section 901:

> ". . . shall not apply to any program or activity of an entity which is an integral part of the religious mission of a church, or which, although not part of such mission, is religious in purpose and character, and where application of this subsection would not be consistent with the

> religious tenets, convictions, practices or ministry of such entity."

It may be true that most Southern Baptist colleges are not actually controlled by the church with which they are affiliated. I do not know. Most Catholic institutions of higher education are not controlled by the Catholic Church but are governed by independent lay boards.

A far more significant problem arising out of the "controlled by" language is that which pertains to elementary and secondary schools which are 100% intensively religious but are not controlled by a particular church. There are many such schools, for example, which are members of the Association of Christian Schools International. They appear not to be protected by the exemptions in Title IX or in S. 557.

2. It is entirely inappropriate that the schools I have described in the last above paragraph should be forced to adhere to federal rules and regulations which conflict with the religious convictions and practices of those schools. Without any doubt, to attempt to force such schools, which would not exist but for their religious purposes, to contradict their religious principles would, due to the Free Exercise Clause of the First Amendment, be unconstitutional.

In that connection, it must be constantly borne in mind that religious liberty is the first-stated guarantee of the five fundamental protections given in the First Amendment. We protect freedom of speech and of the press with exquisite care. It would be intolerable to think of the Congress being less scrupulous in its sensitive concern for the free exercise of religion - a "preferred freedom" (Thomas v. Collins, 323 U.S. 516 (1942), Sherbert v. Verner, 374 U.S. 398 (1963)).

3. If an educational institution would, under some theory, be deemed a recipient of federal financial assistance, it would appear that S. 557, if enacted, would call for penalizing the educational institution if it would not terminate the operation of any organization having campus privileges which, even though for religious reasons, observes sexual differentiation. Further, as presently drafted, with so much lack of definition of terms, S. 557 is pretty much a blank check to enforcement agencies to render determinations of a highly subjective kind as to what activities and policies an educational institution might or might not be permitted to pursue. This conclusion is immensely enhanced by Section 2 of S. 557, by which the Congress would appear to be saying that the ultimate interpretation of the nation's anti-discrimination laws is not to be discoverable from plain language in the bill, but rather in "prior . . . executive branch interpretation." That term includes regulations, guidelines, ad hoc administrative rulings, and even correspondence.

4. It would appear that federal financial assistance to any sub-unit of any religious entity would trigger coverage of the entire entity. It is respectfully suggested that the Congress ponder this matter very closely. This factor of coverage is not restricted to Catholic dioceses (or the sub-units of other hierarchial churches); it applies to all religious organizations, irrespective of whether only

one sub-unit out of 200 sub-units would be a federal assistance recipient. I see nothing in S. 557 which would create any limitation of coverage. If individual sponsors of S. 557 really do not intend such a wholesale mandatory coverage, then words of limitation are absolutely essential.

5. To begin with, it should be understood at the outset that S. 557 is not "legislation overturning the Grove City decision." It merely extends or expands the effect of that decision. Before the Grove City decision it was widely assumed that aid to a student was not aid to his educational institution. Grove City overturned that assumption and said that it is (on, however, a "program-specific" basis). S. 557 would simply go beyond the "program-specific" line of Grove City.

I do not speak for "the Catholic Conference." I have nevertheless examined the amendments to S. 557 which the United States Catholic Conference has proposed. Those amendments are completely "germane" because S. 557's very terms necessarily perpetuate the 1975 interpretation of Title IX by which federally funded educational programs would treat abortion on the same basis as any other temporary disability "with respect to any medical or hospital benefit, service, plan or policy" for students, and like other temporary disabilities "for all job-related purposes."

Either it is or it is not the intention of the sponsors to perpetuate this abortion provision. Section 2 of S. 557 says that the bill is intended to restore "prior executive branch interpretation." The above interpretation is "prior executive branch interpretation." If that is not the intention of the sponsors, they have but to so declare.

But if it is their intention, then one must inquire how the objection to it can possibly be said to be non-"germane".

6. Page 2, lines 13 to 16, of S. 557 recite that Title IX is amended by adding a new section entitled "Interpretation of 'Program or Activity'." Necessarily engrafted upon the word, "Interpretation" is the above-noted Section 2(2)'s language that

> ". . . legislation is necessary in order to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."

Hence S. 557 attempts to transform into national law whatever had been written by administrative agencies (not by the elected representatives of the people) as the "real" meanings of the four acts. Worse, S. 557 now hands the administrators a blank check which they may fill in with whatever their own philosophic intuitions dictate.

7. After very sincere and rigorous attempts to ascertain the meaning of Section 908(1)(B), I have failed. I have dealt extensively in legislative analysis and drafting over the past 35 years, and, in earlier days, was a Teaching Fellow in Languages at a prominent American university. I find Section 908(1)(B) incomprehensible. This anyone will discover, who will attempt the classic exercise of diagramming a sentence. Treating Section 908 as a sentence (as one must), the reading comes to the following:

"Program or activity" or "program" mean

all of the operations of
(B) the entity
of "such" State or local
government that distributes "such"
assistance

and

each "such" department or agency to
to which the assistance is
extended

and

each other entity
"in the case of assistance to a
State or local government."

"Such" (in statutes) is a term of reference to a prior term. Here the "suches" make no sense. The first "such" doesn't meaningfully hook up to any prior term. The second "such" seems to refer back to "the entity of such State or local government that *distributes* such assistance. But then the meaning of (B) turns out to be:

> *each department or agency that distributes assistance to which department or agency assistance is extended*.

This is as confused and internally contradictory as language can be - except for one thing: the addition of the also inexplicable parenthetical phrases "*in the case of* assistance to a State or local government" and "(and each other entity)." While it is inconceivable that state and local governments should be subjected to any such haphazard a collection of words and phrases, it would be reprehensible if the Congress were to certify them to the nation as law.

8. If a state agency receives federal funds and uses these funds to buy goods or services from Company X, Company X would be an indirect beneficiary of the federal funds. It could then be argued that Company X is in the same role in which Grove City College found itself and the state agency in the same role in which the federally aided student found himself. Certainly the thrust of S. 557 is to reach all beneficiaries of federal assistance. Here again, however, is a matter that could be readily clarified by the employment of clear and intelligible definitions. It is to be hoped that, before S. 557 is acted upon in the Senate, this (and all other open questions in this bill) will be both asked and answered.

9. I cannot venture a "correct interpretation of subsection (4)" which refers to "any combination of two or more of the entities described in paragraphs (1), (2) and (3)." The combinations are infinite, due in no small part to the fact that paragraphs (1), (2) and (3) are themselves comprised of dozens of undefined categories, which, in turn, comprise myriad sub-categories. Running the eye down Section 908(1)(A), (B); 2(A) (B); 3(A)(i) (ii), and (B) suffices to illustrate this. The "combination" paragraph ((4)), appears to be simply the kind of catchall writing in which lawyers are apt to indulge who are in too great a hurry to undertake painstaking drafting but who want to make sure they haven't missed something. The inevitable result (well illustrated here) is a statute which is both unconstitutionally overbroad and unconstitutionally vague. Like some other generalizations in S. 557, paragraph (4) readily brings to mind the "sword of Damocles" metaphor of Justice Thurgood Marshall in Arnett v. Kentucky, 416 U.S. 134, 231 (1974):

"the value of a sword of Damocles is that it hangs - not that it drops" (though, in the case of S. 557, the dropping is promised).

10. An entire church could indeed fall within the term, "combination." More important is the fact that S. 557 embraces all churches and religious ministries and all sub-units thereof. No other reason can exist for S. 557's employment of such term as "an entire . . . private organization" (paragraph (3)(A)). The burden of this language is not relieved by the qualifications, "if assistance is extended to such . . . private organization as a whole" (paragraph (3)(A)(i)), because paragraph (3)(B) seems to say that that qualification does not hold "in the case of any other . . . private organization," *i.e.*, one to which assistance was *not* extended "as a whole."

Further, *educational* endeavors, including all religious endeavors, appear covered irrespective of that qualification. (3)(A)(ii) places entities of education, health care, and social services in a separate category from the "assisted-as-a-whole" entities of (3)(A)(i).

11. Section 7 says that nothing in S. 557's amendments "shall be construed to extend application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act." It cannot be determined, from a reading of S. 557 what is meant by "ultimate beneficiaries." More important: the meaning ought to be cleared up by intelligible, explicit language.

"Ultimate beneficiaries" is a breeding ground for administrative confusion and for litigation. To go back to the example of Company X in my answer to Question 8, it is arguable that Company X would not be considered an "ultimate beneficiary" (hence untouched by the Act) any more than Grove City College would be.

12. I do not see how "ultimate beneficiaries" of federal programs enacted after adoption of S. 557 would be excluded from coverage under the four acts. Section 7 of S.557 uses the terms "Federal financial assistance" and "ultimate beneficiaries" without any time limitation. Presumably any "ultimate beneficiary" of a post-enactment program would fall into the same legal slot as any "ultimate beneficiary" of any present program. But left hanging in mid air is, of course, the question of what is meant by "ultimate beneficiary."

13. A hospital affiliated with a religious school could indeed choose not to provide abortions under the law prior to the Grove City decision.

14. Under S. 557 the existing mandatory abortion regulations apply to all of the operations of educational institutions receiving federal financial assistance.

William Bentley Ball

April 15, 1987

The CHAIRMAN. Senator Harkin will be here to reconvene, and then we will start off with Rabbi Saperstein.

We will be in recess.

[Recess.]

Senator HARKIN [presiding]. The Committee will resume its sitting.

As you know, there is a vote going on on the Senate Floor right now, and the Chairman wanted me to continue the hearing because of time constraints.

Senator Kennedy in the hall said that the next witness to recognize would be a long-time friend, Rabbi David Saperstein.

David, welcome to the Committee. Your statement will be made a part of the record in its entirety, and if you could please go ahead and summarize in the five minutes that we have allotted to each witness.

Rabbi SAPERSTEIN. Thank you, Senator Harkin.

I am delighted to be before the Committee and appreciate the submission of my testimony for the record. There are one or two changes that I would like to make when I have the opportunity to clarify some of the language.

My name is David Saperstein. I am the co-Director and Counsel of the Religious Action Center of Reform Judaism, which represents 1.25 million members of the Union of American Hebrew Congregations and the 1,400 members of the Central Conference of American Rabbis in the United States and Canada.

But in addition, I bring with me letters from over 30 Protestant, Jewish and other religious organizations and denominational bodies, which I would like to submit for the record, who join me in supporting passage of the Civil Rights Restoration Act without substantive amendments.

We support the bill because our common commitment to the Judeo-Christian tradition teaches us that all people are equal in the eyes of God and that we are all descended from a common ancestor.

During the two years since I last appeared before this Committee, discrimination has continued as our four basic civil rights laws continue to languish without the teeth needed to enforce their intent. During these two years, men and women have been victims of discrimination, as cases are closed or never filed due to the difficulty of ascertaining whether Federal funds were used in the specific program or activity in which the discriminatory act was alleged to have occurred.

I am particularly dismayed because of the historic role that my own organization played in the passage of the 1964 Civil Rights Act, parts of which were drafted in our Religious Action Center building in the Nation's Capital.

Several groups have proposed amendments which would change substantive law. Some of the suggested changes would be agreed to by the organizations I represent; others, we would oppose. Yet even where we agree, we would oppose their inclusion here.

In order to ensure passage of this vital legislation, other changes should be considered at a different time, and in a different forum.

Additional amendments to this bill will serve only to weigh it down with rhetoric or bog down its chances for passage in lengthy debates over substantive changes. Regardless of the views of the various groups represented here today on changing the current "religious tenet" exemption from religiously "controlled" institutions to "closely identified" or "affiliated" or some other formulation, this would represent exactly the kind of substantive change that should be addressed in a different forum.

Regardless of our views on the religious freedom arguments inherent in preventing discrimination against women on the grounds of abortion, this is not the forum to resolve that issue.

Let me comment briefly on these two controversial issues. The first is abortion. Regulations promulgated by the Republican Ford Administration in 1975 prohibit the discrimination against women on the basis of pregnancy, childbirth, termination of pregnancy, false pregnancy, and recovery therefrom, and require educational institutions which provide health plans for their students and employees to treat these conditions the same as any other temporary disability.

These regulations have been in force for more than a decade without a problem. They remain in force today, after six years of the Reagan Administration. If they should have been changed, if parties wanted them to be changed, the opportunity was here to do it. An exemption written into Title IX permits religious institutions to request a waiver from compliance with any section of Title IX that conflicts with that institution's basic religious tenets.

For ten years, no institution applying for an exemption was denied it on its merits. Perhaps that is a reason that changes have not been made. The system has worked to safeguard the religious liberty of all Americans by permitting religiously controlled educational institutions to still receive Federal funds and maintain their true religious identity.

The second controversial amendment or proposal, to expand the religious tenet exemption, would make a significant substantive change by allowing hundreds of schools and colleges not now eligible for a religious exemption to escape from Title IX coverage. This license to discriminate would encourage many schools which had never had problems functioning under the anti-discrimination requirements now to seek a way out from under them. It must be remembered again that these proposals are not being proposed because of real problems. Indeed, the Department of Education has bent over backwards to accommodate requests for exemptions.

I believe that some of the suggestions made by Mr. Ball in his testimony, including his amendatory language, have a great deal of merit to them. I would like to see some of them incorporated in clarifying language in the legislative history as defining what was intended by the word "controlled". I would hope that in the regulations, these questions can be addressed at some future time. And I would hope that if they are not addressed in that way, that we will work together to address these kinds of concerns in some other legislative forum.

What the organizations I represent feel strongly about is that this is not the forum; this legislation must be passed as expeditiously as possible.

Because of our views on these issues and the consensus in the mainstream Protestant and Jewish communities on this issue, we have noticed that a number of the policy agencies of parent religious bodies of some National Association of Independent Colleges and Universities member schools, including the United Church of Christ and the Society of the United Methodist Church, have clarified the record, indicating that NAICU has misunderstood the policy of these groups in its advocation of expansion of this exemption.

It is instructive to note that a 1985 report by the General Counsel of the United States Catholic Conference concludes that the Civil Rights Restoration Act does not create any new abortion rights, and further that "Catholic institutions are not required to comply with the regulations as a result of the statutory provision which excepts educational institutions controlled by a religious organization of the application of Title IX would not be consistent with the organization's religious tenets."

The Catholic Church now joins with the UAC and other religious groups in supporting the religious tenet language in this version of the legislation. I would hope that whatever changes we wanted to make in the language on these two issues, abortion and religious tenet rights, would be reserved for some other forum, for while we debate here whether anti-abortion or expanded religious tenet language is added, real people are losing ground in the fight for equal opportunity in this country. The issue of the Civil Rights Restoration Act is civil rights. Let the abortion and religious tenet issues, on which we all have strong moral feelings, be addressed in other appropriate forums.

Thank you.

Senator HARKIN. Rabbi Saperstein, thank you very much for your statement.

[The prepared statement of Rabbi Saperstein follows:]

TESTIMONY

RABBI DAVID SAPERSTEIN

On behalf of the Union of American Hebrew Congregations
and the Central Conference of American Rabbis

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON

GROVE CITY LEGISLATION AND RELIGIOUS LIBERTY

April 1, 1987

Mr. Chairman, members of the Committee, I wish to thank you for the opportunity to testify before you in support of the Civil Rights Restoration Act of 1987 (S. 557), and its House counterpart (H.R. 1214).

My name is Rabbi David Saperstein, and I am co-director and counsel of the Religious Action Center of Reform Judaism, representing the 1.25 million members of the Union of American Hebrew Congregations and the 1400 members of the Central Conference of American Rabbis in the United States and Canada. In addition, I bring with me letters from over 30 Protestant, Jewish and other religious organizations and denominational bodies who join me in supporting passage of the Civil Rights Restoration Act without substantive amendments. We support the bill because of our common commitment to the Judeo-Christian tradition, which teaches that all persons are equal in the eyes of God and that we are all descended from a common ancestor.

In July of 1985, I had the opportunity to testify before this Committee on this legislation. At that time, we called for the swift passage of the Restoration Act because of the discrimination against women, the elderly, minorities and the disabled permitted under the Supreme Court's decision in the Grove City case. As has been made amply clear by members of Congress who participated in the legislative debates of 1964, the intent of Congress was to deny federal funding to any institution that discriminated, and not just the specific program or activity receiving funding.

During the two years since I last appeared before this Committee, discrimination has continued as our four basic civil rights laws -- the Civil

Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 -- languish without teeth. During these two years, men and women have been victims of discrimination as cases are closed or never filed due to the difficulty of ascertaining whether federal funds were used in the specific program or activity in which the discriminatory act was alleged to have occurred. I am particularly dismayed because of the historic role of the Union of American Hebrew Congregations in the passage of the 1964 Civil Rights law, parts of which were drafted in our Religious Action Center building in the nation's capital. We feel particularly committed to the restoration of the civil rights laws to their full potency.

I want to make clear that the vast majority of mainstream religious organizations accept a broad based consensus that passage of the Civil Rights Restoration Act requires passage essentially as introduced, without substantive amendments.

Reservations have been noted concerning the effects of this legislation on various groups of people. As an attorney and professor of law, I, and the civil rights and constitutional attorneys with whom I have consulted, concur with Senator Kennedy, Senator Weicker and many others on this Committee that the only effect of the Grove City bill will be to restore the interpretation of the four nondiscrimination statutes to their status the day before the Grove City decision in 1984. This is a straightforward issue: insofar as it is possible, no changes in substantive law or reinterpretation are intended.

A number of concerns with the bill as introduced in 1985 due to vagueness of language have been addressed with consensus approval. Questions such as ultimate beneficiaries and protections for small businesses and farmers have been answered with clarifying language.

Several groups, however, have proposed amendments which would change substantive law. Some of the suggested changes would be agreed to by the organizations I represent; others we would oppose. Yet, even where we agree, we would oppose their inclusion here. In order to ensure passage of this vital legislation, other changes should be considered at a different time and in a different forum. We would, however, be in favor of adding language to clarify some of these concerns if such clarifications do not change the legislation substantively, enjoyed consensus approval and can be legitimately addressed in the legislative history of the Restoration Act rather than in the form of an amendment that would change substantive law.

Additional amendments to this bill will serve only to weigh it down with rhetoric or bog down its chances for passage in lengthy debates over substantive changes to the law. Regardless of the views of the various groups represented here today on changing the current "religious tenet" exemption from religiously "controlled" institutions to "closely identified" institutions, this would represent the kind of substantive change that should be addressed in a different forum. Regardless of our views on the religious freedom arguments inherent in preventing discrimination against women on the grounds of abortion, this is not the forum to resolve that issue.

Let me comment briefly on these two controversial issues. The first is abortion. Regulations promulgated by the Republican Ford Administration in

1975 prohibit the discrimination against women on the basis of pregnancy, childbirth, termination of pregnancy, false pregnancy, and recovery therefrom, and require educational institutions which provide health plans for their students and employees to treat these conditions the same as any other temporary disability. The regulations have been in force for more than a decade without a problem. An exemption written into Title IX permits religious institutions to request a waiver from compliance with any section of Title IX which conflicts with that institution's basic religious tenets. For ten years, no institution applying for an exemption was denied it on its merits. The system worked to safeguard the religious liberty of all Americans by permitting religiously controlled educational institutions to still receive federal funds and maintain their true religious identity.

The second controversial amendment, expanding the religious tenet exemption, would make a significant substantive change by allowing hundreds of schools and colleges not now eligible for a religious exemption to escape from Title IX coverage. This license to discriminate would encourage many schools which had never had problems functioning under the anti-discrimination requirements to seek a way out from under them. It must be remembered again, that this proposed amendment is not being proposed because of real problems. Indeed, the Department of Education has bent over backwards to accomodate requests for exemptions.

It is for this reason that a number of parent religious bodies of some National Association of Independent Colleges and Universities (NAICU) member schools, including the United Church of Christ and the United Methodist Church have gone on record stating that NAICU has misunderstood the policy of these religious organizations in advocating an expansion of this exemption.

It is instructive to note that a 1985 report by the General Counsel of the United States Catholic Conference concludes that the Civil Rights Restoration Act does not create any new abortion rights, and further that "Catholic institutions are not required to comply with the regulations as a result of the statutory provision which excepts educational institutions controlled by a religious organization if the application of Title IX would not be consistent with the organization's religious tenets."

Mr. Chairman, while we debate here whether anti-abortion and expanded religious tenet language is added, real people are losing ground in the fight for equal opportunity in this country. The issue of the Civil Rights Restoration Act is not abortion -- it is civil rights.

This bill would restore the enforcement scheme intended by Congress for our four vital civil rights laws -- nothing more, nothing less. While this bill languishes, men and women who are entitled to the full protection of our civil rights statutes are thwarted in their efforts to find simple justice and our tax dollars continue to support institutions which discriminate. Our nation should look forward to increasing opportunity for all Americans, regardless of race, national origin, gender, age, or disabling condition. That is all the Civil Rights Restoration Act does. As a representative of the religious community, and the Jewish community in particular, I urge you to pass the bill as introduced as quickly as possible.

Senator Harkin. Do you have any questions for this panel, Senator Mikulski?

Senator Mikulski. Yes, I do. I thank the panel for their erudite presentation, as well as the support of the passage for this legislation.

I have a question for Monsignor Sullivan—it is Monsignor, isn't it?

Bishop Sullivan. You have just demoted me. I am a Bishop. That is okay. Here, they call me "Mister" Sullivan.

Senator Mikulski. I am sorry—you might prefer being a monsignor these days, Bishop. [Laughter.]

Bishop Sullivan, I was very impressed with the testimony and some of the questions you raised, particularly in terms of the complexity of implementation because of the large numbers of organizations within a diocese. On that point, on the question of whether all the activities of diocese could be subject to coverage if any part of the diocese receives Federal assistance prior to Grove City, prior to Grove City was that actually a problem, and is that how Title IX was applied before Grove City?

Bishop Sullivan. Senator, let me refer that to counsel, all right?

Mr. Liekweg. Senator, my name is John Liekweg and I am the Associate General Counsel for the U.S. Catholic Conference.

I have no knowledge that prior to Grove City that an entire diocese would have been covered. The difficulty we have with some of the language in S. 557—and I am particularly concerned about the use of the word "combination"—is that it is not defined in the bill. In the dictionary definition, a diocese could be considered a combination.

Senator Mikulski. It is my understanding from Senator Kennedy that this legislation restores things to the way they were before Grove City, and that it does nothing more and that it does nothing less. If you did not have problems before Grove City, why would there then be problems now as a result of this legislation—or, is there some language that we overlooked in the review of the bill?

Mr. Liekweg. I am not familiar with the term "combination" being used prior to Grove City in the regulations or elsewhere. So I think we have introduced a new term into the bill, and I am not sure what it means. And I do not know that we can rely on legislative history to clarify it. Let me elaborate a little bit on that point.

On the House side in the last session, similar language was in the bill that was reported out of Judiciary. The Committee Report—and we were hopeful we would get some clarification in the Committee Report—unfortunately did not elaborate on the meaning.

Senator Mikulski. Please pull the microphone up; it is hard to hear you.

Mr. Liekweg. Do you want me to repeat?

Senator Mikulski. No. I am hearing you, but I want everyone to hear you.

Mr. Liekweg. So on the face of the bill itself—and when a court goes to construe the statute, it is going to look at the language first. We do not know what the legislative history is going to say, and we are stuck right now with what the language says. And the language, quite frankly, at least in the area of "combination", is undefined.

Senator **Mikulski**. So the word "combination" is new, and therefore is unclear, in your mind?

Mr. **Liekweg**. It is unclear to me, and I do not have any recollection of where it was used previously. I am not going to try to say that it has never been used in any of the agency interpretations or elsewhere. But it is a new term in the statute for sure.

Senator **Mikulski**. So it is in that word "combination" that you have some concern?

Mr. **Liekweg**. It is in "combination" and also I have some concern about the language as a whole that Mr. Ball referred to. I do not know——

Senator **Mikulski**. The phrase, "as a whole"?

Mr. **Liekweg**. The phrase, "as a whole"—I do not know what "receiving assistance as a whole" means.

Senator **Mikulski**. So those are the two areas, the word "combination" and "as a whole"; is that correct?

Mr. **Liekweg**. Those two areas. There is a third area which is in the use of the term "other school system". Prior to Grove City, I am not aware of a situation in which Federal assistance triggered coverage of, say, an entire diocesan school system. The Title IX regulations do not use the term, "other school system". So this is also a new phraseology, and we are not sure what it means.

Senator **Mikulski**. Okay.

Mr. **Liekweg**. I do not know who else would be covered other than the Catholic school systems under this language.

Senator **Mikulski**. Mr. Ball, I will come back to you, but I would like to further question Bishop Sullivan, if I may.

We are post Vatican II, so therefore the phrase "controlled by the church" is far more gray than it was, say, in 1947. What, in your mind, in terms of the church's position, is "controlled by the church" to mean, particularly when facilities are operated by independent orders—the Jesuits, the Sisters of Mercy, their schools and their hospitals?

Bishop **Sullivan**. Well, kinetically controlled by the church would mean that it is under the direct supervision whether of a diocese or a religious community; it would include them. So that what it essentially means is a corporation that is responsive to the direct leadership of the corporating diocese or religious community and would have effect over its policies and administration of that organization.

As you know, in some of the things that have happened irrespective of post Vatican II, more so because of such things as the Bundy law in New York State, where religious institutions have in a sense secularized, although they are affiliated or they are in some way still identified very clearly, so there are many universities in my own State that still consider themselves very much Catholic, but they are not directly in a sense under the control and supervision because they have incorporation with a board of directors that would be a lay board of directors, and that is not a direct religious community.

There are some opportunities within church law at the present time in the revision of the code and some ways of involving them with what they call Pious Associations of the Laity and so on. We do not want to go into all the technicalities. But the reality is we feel that when it says "controlled" it is under the direct supervision and operation in terms of its policy and administration by a church entity, either the diocese or religious community.

Senator **Mikulski**. So then, every Catholic college would have to be viewed separately as to the way it had constituted itself as a corporation in this post Vatican II milieu.

Bishop **Sullivan**. It would have to be looked at. I cannot talk, *because I am not an* educator as such—and Mr. Ball probably knows this better than anybody—but I think that you cannot say it is one situation. You cannot say Catholic colleges are all in the same boat today. They differ very substantially.

Senator **Mikulski**. So that if one Catholic college, for example—which we will just say the Sisters of the Good Heart—maintained control of their board, even though they had lay people on it, an ecumenical board, just as we were speaking of, it would then, if it was controlled by the Sisters of the Good Heart, be under the diocese.

Bishop **Sullivan**. It would be considered controlled by the church, in a sense, by a church entity, not necessarily under the bishop. They would be controlled in a sense within the canon law of the church.

What they do for the most part, they reserve certain powers to a membership corporation, and they transfer to the board of trustees the operation and direction of the institution. But certain powers such as the alienation of property, the Catholic tenets of the institution, would be guided in a sense by the Sisters.

Senator **Mikulski** (presiding). I am now the Chair. The Sisters of the Good Heart never had it so good. [Laughter.]

Bishop **Sullivan**. I knew you were looking for this opportunity to roast a Bishop, too.

Senator **Mikulski**. But then there could be another college run by the Sisters or by a religious order that truly secularized its board in which religious people might be part of the faculty, part of the board——

Bishop **Sullivan**. They might be a board of trustees, separately incorporated and no longer under the particular domination and, in a sense, control of that religious community. That is possible.

Senator **Mikulski**. So then it would have to be on a college-by-college basis, is that correct?

Bishop **Sullivan**. I say "yes", but I would say I think they fall into categories. Now, I do not think there are vast different incorporation practices. There are probably several models. But I do not think it would mean something that is totally, in a sense, runaway—multiple models of how that is done.

Senator **Mikulski**. And therefore those colleges that had secularized themselves, which essentially had given up being under the control of a religious order—therefore, the church—could not claim the religious tenet exemption. Is that correct?

Bishop **Sullivan**. Well, that is my understanding of their concern and how they are included. At the same time, while we are greatly concerned about that, we do not want to see the extension. I think as the Rabbi has indicated, our concern would be other groups who would exploit this. So I mean, it has to be carefully done. We are concerned that many of those institutions, quote, that are no longer under the control, many of them could still consider themselves as Catholic institutions.

Senator **Mikulski**. Bishop Sullivan, that was a very good presentation, and I think we would like to hear further clarification or other suggestions you would like to make.

I would like to mention two things, and then, Mr. Ball, if you wanted to elaborate, your comments would be most welcome. Two things. One, this whole issue of church and state, of course, is very important to those of us who are American Catholics, very, very important. And we would welcome, on two others matters, any suggestions you have as we do Title I and Title II to comply with the Felton decision, but at the same time to make it reasonable and less expensive without going into vouchers.

The other, I would just bring to your attention. I just left Secretary Pierce—you might remember he is the Secretary of Housing—and my concern was that they are about to issue regulations that would prohibit them from dealing with the homeless, of issuing funds to enable churches to rehabilitate buildings to make them available. And we would welcome your comments on this area.

Bishop **Sullivan**. We have taken positions, and I can get you testimony from Catholic Charities, which has taken a very strong position on this. If anyone wants to look across the country and see what neighborhood groups have done the most to really respond to the issue of the homeless in this country, they will find to a large extent it is church institutions. And we find those regulations absolutely impossible.

Senator **Mikulski**. Mr. Liekweg?

Mr. **Liekweg**. Senator, we have also submitted formal comments on that Notice of Proposed Rulemaking for the Conference, and I can provide a copy of that.

Senator **Mikulski**. Thank you. I would appreciate that.

[Information supplied follows:]

UNITED STATES CATHOLIC CONFERENCE
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 [illegible]

Office of General Counsel

May 8, 1987

Mr. James W. Powell
Editor
Senate Committee on Labor and
  Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Powell,

Please find enclosed the transcript of my remarks which was forwarded to me by Mr. Rollins. I have made one correction on page 94. The document referred to on page 101 does not relate directly to the subject of the hearings. I previously forwarded our comments on the Emergency Shelter Grants Program proposed regulations directly to Senator Mikulski's office.

Please excuse my tardiness in returning the transcript. Out of town travel and the press of other business caused the delay. Please contact me if you have any questions.

Sincerely yours,

John A. Liekweg
Associate General Counsel

Enclosure

JAL/sgw

Senator Metzenbaum. Mr. Ball, did you want to further comment on the concept of "whole"?

Mr. Ball. Yes. It is very kind of you, Senator, to allow me to make any further comment. I am looking at the term "as a whole", I am looking at the term, "entire plant", "combination", "an entire private organization", and as I am sitting here, I am saying "Why are we asking these questions?" Why ought not the Congress to be saying what it means?

Evidently, there are questions very much alive in the Congress, possibly in your own mind, as to what those terms mean, and it seems to me that the Congress ought not to be palming this off on the courts and saying, "You figure out what it means." Rather, it is the job of the Congress as the lawmaker, the legislator, to define terms so that nobody can have any doubt as to what this, that or the other thing means.

If it were the desire of anyone to really, dramatically control religious organizations by means of legislation, then say so. But this is the thing that needs to be surfaced in these discussions of this bill.

I disagree very much with Mr. Saperstein, who says in effect, "Postpone these problems to another day." They are real problems here and now, or we would not be here.

Senator Metzenbaum. Well, we appreciate that, Mr. Ball. Did you, however, want to elaborate on the concept of "whole" rather than reiterate——

Mr. Ball. I am sorry, I did not hear you.

Senator Metzenbaum. Right now, you are reiterating the fact that you said they were confusing. Was there anything you wanted to add to clarify the confusion?

Mr. Ball. No. I do not think this language is manageable. I think it needs redoing. When you say——

Senator Metzenbaum. And I think that point has been well-stated, Mr. Ball. I think you have well-stated that point.

Mr. Ball. Oh, all right. Thank you.

Senator Metzenbaum. Mr. Saperstein?

Rabbi Saperstein. I would suggest that the term, "combination" as I read it in its simple meaning here, was not intended to go beyond what the sum of any of the parts elaborated in 1, 2, or 3 would be. And therefore, what I presume it had in mind—and I would hope that in legislative history this could be clarified—was that there are a number of combinations of State and local entities—the Metro system here in Washington being an example, the Port Authority in New York being an example—there are a number of examples of combination of public and private entities—COMSAT, which you can buy over-the-counter stock in and the Government owns a part of it—and I am not sure of this—but I would think the Corporation for Public Broadcasting might represent a combination of several of the entities there. So it would be more than a sum of the parts, but I would think those are the kinds of questions that could be clarified, and I think should be to the extent they can in legislative history.

I believe, as I have said before in just 30 seconds here, that passage of the legislation is so compellingly important that it ought not be jeopardized by trying to clarify every point that was ambiguous before the Grove City decision anyway. This is not the one forum to resolve all problems with it. We work them out over a period of time.

Senator MIKULSKI. But it is the prime forum.

Rabbi SAPERSTEIN. Agreed.

Senator MIKULSKI. Well, I thank the panel, and I know Senator Kennedy does. They are in the midst of concluding the vote on the veto override. But we would like to thank the panel for its testimony and for its support of this civil rights legislation. We look forward to working with you.

We are now going to move to Panel 4. We welcome this panel consisting of James Conway, Director of Human Resources and Equal Employment Opportunity of the National Association of Manufacturers, and Lex Frieden, Executive Director for the National Council on the Handicapped.

Mr. Conway, why don't you just lead off with your testimony?

STATEMENTS OF JAMES F. CONWAY, JR., DIRECTOR, HUMAN RESOURCES AND EQUAL EMPLOYMENT OPPORTUNITY, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, DC; AND LEX FRIEDEN, EXECUTIVE DIRECTOR, NATIONAL COUNCIL ON THE HANDICAPPED, ACCOMPANIED BY BOB BURGDORF, RESEARCH SPECIALIST

Mr. CONWAY. Thank you, Senator. I will make my remarks brief and if I could have our testimony put into the record.

Senator MIKULSKI. Hearing no objection, so ordered.

Mr. CONWAY. I am James F. Conway, Director of Human Resources with the NAM.

Senator MIKULSKI. However, Mr. Conway, pull the microphone up. I think we need to be sure that both our recorder and the audience hears you. We have got a good sound system if we use it.

Mr. CONWAY. OK. The NAM is a voluntary business association of over 13,000 companies of every size, industrial classification, and we are located in every State. Our members employ 85 percent of the Nation's workers in manufacturing employment and produce over 80 percent of the Nation's manufactured goods.

Let me make it clear at the outset that the National Association of Manufacturers opposes any discrimination in whatever form or however manifested against persons on the basis of race, sex, color, national origin, handicap, religion or age.

Indeed, the NAM has vigilantly supported voluntary affirmative action programs, and we have continually defended the enforcement of Executive Order 11246.

Finally, we support efforts to remedy Title IX program-specific limitations decided in the Grove City case by returning to the coverage principles that were followed before that decision.

The Civil Rights Restoration Act, S. 557, specifies extremely broad coverage principles for any entity which receives Federal funds regardless of the amount or purpose of the funding.

We feel that the bill would not simply restore the pre-Grove City scope of coverage under Titles VI and IX, the Rehabilitation Act and the Age Discrimination Act. If enacted, we believe there would be a vast expansion of Federal statutory coverage over business.

The important point to note is that S. 557 does not merely "restore" the state of law to pre-Grove City status. Previously, the law did not apply on a corporate-wide basis if a business accepted Federal assistance in a general manner. Further, the specific industries mentioned in the bill were not singled out for blanket coverage, no matter what the type of funding they were involved in.

Though the NAM believes that a legislative reversal of Grove City would be a worthwhile endeavor, we are opposed to the expansion of the law which would trigger an increased Federal intrusion into the private sector.

One of our fears is that it would be a disincentive for private employer participation in various Federal assistance programs. Many companies participate in Federal job training programs such as the Job Training Partnership Act. An employer might well be reluctant to participate in such a program, fearing that the Government would intervene into the operations of a plant or perhaps, due to the ambiguity of coverage, consider the entire operations of the business to be covered. Small businesses in particular would find that very burdensome.

The net result would be that the people who benefit most from programs such as JTPA would not get the training necessary to enter the private sector and contribute to our economy.

We also fear—and I will not go into detail—but we fear the possibility of increased litigation, compliance reviews and very burdensome paperwork.

The NAM believe that a true restoration of the law to its pre-Grove City status is in order. And we oppose discriminatory practices of any kind, and our policy has continuously supported voluntary affirmative action plans in the private sector.

However, what is not needed now is an unnecessary expansion of the law that will be burdensome and costly to business during a period when national competitiveness is a clear priority. Many companies who now participate in a variety of Federal programs may be reluctant to continue their involvement when faced with the specter of increased paperwork, compliance reviews, and legal costs. If, because of these reasons, there is less private sector involvement in Federal programs, it will be the intended beneficiaries of these programs who will suffer the most.

The Grove City issue has been debated before Congress for over two years. There have been numerous legislative attempts to change that decision, and all have failed. The NAM urges this Committee to consider legislation that would reverse Grove City without increasing an already substantial statutory and regulatory burden that the private sector must bear.

With that, Senator, I will conclude.

Senator MIKULSKI. Thank you very much, Mr. Conway.

[The prepared statement of Mr. Conway follows:]

MANUFACTURING
CREATES
AMERICA'S
STRENGTH

TESTIMONY
ON
THE CIVIL RIGHTS RESTORATION ACT OF 1987

BY
JAMES F. CONWAY, JR.
DIRECTOR, HUMAN RESOURCES AND EQUAL OPPORTUNITY
THE NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
APRIL 1, 1987

NAM

National Association of Manufacturers
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SUMMARY

The Supreme Court decided the case of Grove City College v. Bell in 1984. The Court's decision established two new points of law regarding Title IX of the Education Amendments Act of 1972. First, educational institutions that indirectly receive federal funds through students participation in aid programs are subject to Title IX's discrimination provisions. The decision also found that Title IX would be applied in a "program specific" manner and would not cover the entire institution.

It was thought by some that the "program specific" language would impact on three other statutes; Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975. Various bills have been introduced over the past three years that would have expanded the scope of corporate coverage of these four statutes.

"The Civil Rights Restoration Act of 1987: (S. 557, Kennedy, D-MA) proposes to significantly expand the law beyond its pre - Grove City state. Businesses who accept a grant or participate generally in a federal program would now be covered on a corporate-wide basis by all four statutes. There would be plant-wide coverage if the federal aid is specificially earmarked for that facility. Certain industries would be covered on a corporate-wide basis regardless of the nature of their participation in a federal program.

The NAM believes that S. 557 is a significant expansion of statutory coverage and will greatly increase the federal presence in the private sector. With competitiveness a clear national priority, S. 557 would place an enormous litigation, compliance and paperwork burden on employers, particularly small businesses. Though we support a return of the law to its pre - Grove City state, we believe that this bill would be costly, burdensome and provide a disincentive for private sector involvement in federal programs.

Mr. Chairman and members of the Committee, I am James F. Conway, Director Of Human Resources and Equal Opportunity with the National Association of Manufacturers. The NAM is a voluntary business association of over 13,000 companies of every size and industrial classification, located in every state. Our members employ 85 percent of the nation's workers in manufacturing employment and produce over 80 percent of the nation's manufactured goods. NAM also has an affiliation with 158,000 businesses through its Associations Council and the National Industrial Council.

The NAM thanks you Chairman Kennedy and members of the Committee, for the opportunity to comment on legislative efforts that address the Supreme Court's decision in Grove City College v. Bell (1984).

I. THE GROVE CITY DECISION

The Supreme Court's decision in Grove City College v. Bell, was twofold. First, it held that an educational institution that indirectly receives federal funds is subject to the discrimination provisions of Title IX of the Education Amendments of 1972. Thus, federal education aid to a student constitutes federal aid to the college which enrolls him or her. Secondly, the more important aspect of the Court's ruling was that Title IX applies only to the particular department or program of the institution that receives federal funds and not to the entire university. By implication, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975 would apply only to that program.

Title IX forbids discrimination "on the basis of sex... under any education program or activity receiving federal financial assistance ...." 20 U.S.C. s 168(a).

Title VI forbids discrimination "on the ground of race, color or national origin .... under any program or activity receiving federal assistance..." 42 U.S.P. s 2000(d).

Section 504 of the Rehabilitation Act forbids discrimination against an "otherwise qualified handicapped individual...solely by reason of ... handicap...under any program or activity receiving federal financial assistance..." 29 U.S.C. s. 794.

The Age Discrimination Act of 1975 forbids discrimination "on the basis of age...under any program or activity receiving federal financial assistance..." 42 U.S.C. s. 6102.

II. "PROGRAM SPECIFIC" LANGUAGE

Initially, it should be made clear that the National Association of Manufacturers (NAM) opposes any discrimination, in whatever form or however manifested, against persons on the basis of race, sex, color national origin, handicaps, religion or age. Indeed, the NAM has vigilantly supported voluntary affirmative action programs and the continued enforcement of Executive Order 11246. Furthemore, we support efforts to remedy the Title IX program specific limitations decided in the Grove City case by returning to the coverage principles that were followed before that decision.

NAM member concern during the last three years of debate on this issue has focused on attempts to go beyond removal of Title IX "program specific" limitations as interpreted by the Supreme Court. Such legislation, if approved, would have sweeping ramifications for private, as well as public institutions and employers.

III. LEGISLATIVE BACKGROUND

Since 1984, there have been several legislative attempts to overturn the Grove City decision. The Civil Rights Act of 1984 proposed major changes in the application of Titles VI and IX, the Rehabilitation Act and the Age Discrimination Act. The legislation would have amended each statute by deleting the term "program or activity" and substituting the term "recipient." That change would have resulted in coverage by all four statutes of the entire operations of any private entity which receives federal funds or receives such funds indirectly from a direct recipient of federal funds.

It would be hard to imagine a private employer who would not be considered at least an indirect recipient of federal assistance if that law had passed.

The Civil Rights Restoration Act of 1985, introduced early in 1985, though broadening the law beyond its pre - Grove City state, offered somewhat less expansive corporate coverage. That bill deleted the language that would have covered all the operations of a corporation if any part received federal aid. The legislation stated that there would be total corporate coverage only if a federal grant was received by a corporation "as a whole." Thus, in theory, if a single plant was a participant in a federal assistance program, only that plant would be covered by the four discrimination statutes. The language contained in the bill was sufficiently ambiguous to argue that if federal funds were given to a corporation which then used the funds to conduct a program at a specific plant, the money would be considered as having been received by the corporation "as a whole."

None of these bills reached the House or Senate floors.

IV. THE CIVIL RIGHTS RESTORATION ACT OF 1987

The Civil Rights Restoration Act of 1987 (S. 557 Kennedy: D-MA), specifies extremely broad coverage principles for any entity which receives federal funds regardless of the amount or purpose of the funding. The bill would not simply restore the pre - Grove City scope of coverage under Titles VI and IX, the Rehabilitation Act and the Age Discrimination Act. If enacted, there would be a vast expansion of federal statutory coverage over business.

The bill states, at Section (3)(A), that an entire corporation will be covered by all four statutes if federal assistance is extended to that corporation "as a whole."

Consider this example. A corporation has facilities at several locations and one facility decides to participate in the Job Training Partnership Program (JTPA). Application to participate in JTPA is made in the corporate name. Would that manner of application trigger corporate-wide coverage? There are other questions. If federal assistance is offered to a corporation for a specific geographical area of operations, would there be corporate-wide coverage? Corporate accounting practices vary greatly and in many companies separate facilities are not separate entities. Thus if a check were made out to a corporation to fund a program at a particular facility, would the entire corporation be deemed to have "received" the funds?

S. 557 also expands pre - Grove City law by singling out several industries whose entire operations would be covered by all four statutes regardless of the nature of federal assistance. The companies singled out are those principally engaged in health care, housing, education, social services and parks and recreation.

The important point to note is that S. 557 does not merely "restore" the state of law to pre - Grove City status. Previously the law did not apply on a corporate-wide basis if a busines accepted federal assistance in a general manner. Further, the specific industries mentioned above were not singled out for blanket coverage. Though the NAM believes that a legislative reversal of Grove City would be a worthwhile endeavor, we are opposed to an expansion of the law which would trigger increased federal intrusion into the private sector.

S. 557, if enacted, would provide a disincentive for private employer participation in various federal assistance programs. Many companies participate in federally funded job training programs such as the JTPA. An employer might well be reluctant to participate in such a program, fearing that the government would intervene into the operations of a plant, or perhaps due to ambiguity of coverage discussed earlier, consider the entire operations of that business to be covered. Small businesses would find that result particularly burdensome. The net result would be that the people who benefit most from programs such as JTPA, would not get the training necessary to enter the private sector and contribute to our economy.

Another concern has to do with multiple agency enforcement created by this bill. Employers accused of discrimination are already subject to investigation and litigation in several different forums: The Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, federal suits, state agencies, state private suits and arbitrations. The pending legislation would add greatly to the bureaucratic load companies must bear. The bill would retain enforcement jurisdiction in all current agencies, but also give enforcement power to any federal agency which provides federal funds.

If one or more parts of an employers' operation received federal aid, an innumerable number of federal agencies could have jurisdiction over all the operations of the company. Further, the company might also find itself adrift in a sea of reporting requirements and compliance reviews. This makes no sense at a time when government is striving toward regulatory reform.

The problems created by multiple enforcement agencies do not end with the paperwork. One important consideration is that many of the agencies that will make determinations under this bill lack expertise in employment and civil rights law. Lack of consistency is bound to be the hallmark of diffuse enforcement. This lack of consistency could result in confused legal standards and agency enforcement practices that the employer has depended on from the Equal Employment Commission and the Office of Federal Contract Compliance Programs.

With any number of agencies to choose from, individuals will undoubtedly begin forum shopping. An individual may file the same complaint with numerous agencies, all with equal power of enforcement. This would be costly to the government and unreasonably burdensome to employers. Furthermore, the cases of discrimination may, in appropriate situations, still be referred to the Justice Department, which may sue in federal courts. It is obvious that a litigant would seek to bring a claim before the most sympathetic forum of the many available.

The proliferation of lawsuits and complaints resulting from this provision cannot be overstated. An employer would be subject to reporting requirements, compliance reviews and enforcement from several federal agencies. There would be an erosion of legal standards and precedent upon which an employer may rely. Further, with the great availability of tribunals, there will be an inordinate opportunity to file duplicate claims in different forums.

V. PRIVATE CAUSES OF ACTION

The last area of concern focuses on the potential for an immense increase in private causes of action in federal courts as a result of this bill. Titles VI and IX, and the

Rehabilitation Act allow for private causes of action against "recipients" of federal funds. It should be noted that none of these statutes require the same procedural steps that have to be taken before the EEOC and OFCCP. Also, there would not be any bar to private litigants pursuing these private remedies in addition to filing charges with the EEOC and OFCCP. This private right to action may prove especially costly to employers since an award of attorneys fees can be made to prevailing plaintiffs. Companies may tend to settle even dubious suits to limit future expensive litigation costs.

CONCLUSION

The NAM believes that a true restoration of the law to its pre Grove City status is in order. We oppose discriminatory practices of any kind and our policy has continuously supported voluntary affirmative action plans in the private sector. What is not needed now is an unnecessary expansion of the law that will be burdensome and costly to business during a period when national competitiveness is a clear priority.

Many companies, who now participate in a variety of federal programs, may be reluctant to continue their involvement when faced with the specter of increased paperwork, compliance reviews and legal costs. If, because of these reasons, there is less private sector involvement in federal programs, it will be the intended beneficiaries of those programs who will suffer. The Grove City issue has been debated before Congress for over two years. There have been numerous legislative attempts to change that decision. All have failed. The NAM urges this committee to consider legislation that would reverse Grove City without increasing an already substantial statutory and regulatory burden that the private sector must bear.

Mr. Chairman and members of the Committee, thank you for the opportunity you have afforded us to express our views on this important issue.

Senator MIKULSKI. We would now like to welcome Lex Frieden, the Executive Director of the National Council on the Handicapped.

Mr. Frieden, in addition to my own welcome I add that of Senator Kennedy. Senator Weicker in particular asked me to give you a special "hello" for him, but committee business elsewhere prevents him from being here. The very causes that you advocate means he is there shepherding them in another committee. So a special "hi" from him.

Mr. FRIEDEN. Thank you very much, Senator.

My name is Lex Frieden. I am the Executive Director of the National Council on the Handicapped. I am accompanied here today by Robert Burgdorf *Jr.*, Research Specialist with the National Council on the Handicapped and a person who the Council considers to be one of the most knowledgeable experts in the field of disability law today.

On behalf of our Chairperson, Sandra Swift Parrino, and the members of the National Council on the Handicapped, I would like to thank this Committee for seeking the Council's views on this very important piece of legislation. We are pleased to be able to share our opinions about the principles addressed by this legislation.

As you know, the Council is an independent Federal agency made up of 15 members who are appointed by the President, confirmed by the Senate, and charged with the responsibility of reviewing all Federal laws, programs, and policies affecting the lives of people with disabilities and advising the President and the Congress on those matters.

The views which we express here today are those of the National Council on the Handicapped and do not necessarily represent those of any other Federal agency or the Administration. I would like to have the complete text of our statement included in the record if we may, please. Thank you.

In the process of pursuing its statutory mandate and advising Congress and the President on disability issues, the Council has had the opportunity to hear, by the mechanism of public forums, from disabled people all over the United States. During the past six years, the Council has heard from literally thousands of people with disabilities, their parents, service providers and concerned individuals. The number one concern addressed by people with disabilities throughout the country is that they need to have equal opportunities and equal protection under the law.

Thousands of people have recounted examples of instances when they felt as though they had been discriminated against on the basis of disability. I would like to share with the Committee an example of one such experience that occurred in my own life.

Nearly 20 years ago, I broke my neck in an automobile accident while I was a freshman in college. Less than a year after that, I applied for admission to a major university in the Southwest, and my admission application was denied strictly on the basis of the fact that I was disabled. I was disturbed by that denial. I spoke to the university administrators, and I was told that this action was based on university policy. I inquired from others about this policy and was told that I had no protection under the law; that in fact this discrimination was perfectly legal although I considered it to be a legal assault.

I must say that I was somewhat dismayed by that. As you can imagine I was demoralized, and certainly disillusioned about the legal protections which we as Americans expect to have in this great Nation.

When the Rehabilitation Act of 1973 was passed and included Section 504, many of us felt that that was our civil rights affirmation. Millions of disabled people rejoiced at the promise of Section 504 of the Rehabilitation Act and since then have depended on it for protection in instances where discrimination has occurred.

However, since the Grove City decision in 1984, millions of people with disabilities have once again become disillusioned. I might add that my own personal experience could be repeated today by people with disabilities applying for admission to universities. On the basis of the Grove City decision, they could be denied admission. Strictly on the basis of their disabilities.

I believe that it is important for this Committee to clearly understand the tremendous responsibility which we all have now to reverse the Grove City decision.

Disabled people want to have the opportunity to be productive citizens. We want to be independent. We want to be taxpayers and not tax users.

It is clear to us that the protections enjoyed by other groups must be enjoyed by people with disabilities. The Council is committed to the restoration of the civil rights provisions of Section 504 of the Rehabilitation Act. In our report, "Toward Independence," which we submitted to the President and Congress a year ago, the Council stated that any person or agency that wishes to obtain Federal grant funds should be required to avoid or cease discriminating in all of its activities.

Conversely stated, the Federal Government should not provide financial assistance to any person or agency that engages in discrimination in any part of its operations or activities.

If our Nation's commitment to equality of opportunity for its citizens is to have any meaning at all, the Council believes that Congress must restore Section 504 and other civil rights laws to the breadth of coverage that they had prior to the Grove City and Darrone decisions. The Council has stated in "Toward Independence" that even before Grove City narrowed the scope of Section 504, persons with disabilities had much less protection against discrimination than other groups had under civil rights laws protecting them.

At some time in the future, the Council intends to provide this Committee with its views regarding a more comprehensive approach to prohibiting the discrimination faced by persons with disabilities. But the Council believes that an absolutely necessary first step is to return the scope of coverage of Section 504 and the other civil rights laws to their status prior to the Supreme Court's ruling in the Grove City case.

The Council is aware of other concerns which have been expressed by witnesses here today and by others about the implications of the Civil Rights Restoration Act as it applies to discrimination against persons with disabilities. One concern that we have heard is that employers are opposed to statutory prohibitions of employment discrimination against persons with disabilities. Data that we have from a recent Louis Harris poll "Employing Disabled Americans," however, contradicts that indication. Three-fourths of company managers interviewed by the Harris firm reported that they believe that persons with disabilities often do encounter job discrimination, and over 70 percent stated that civil rights laws should protect persons with disabilities.

Another unconfirmed belief is that it is burdensome for employers to provide equal employment opportunities for persons with disabilities. The Harris poll reaffirmed prior studies that indicate employers believe people with disabilities are among their best employees. The majority of managers rated disabled employees as good or excellent on their overall job performance.

Another thing that we have heard is that employing people with disabilities costs inordinate amounts of money. A 1982 Department of Labor study of workplace accommodations concluded that accommodating disabled people is, "no big deal." The Harris poll of employers verifies the results of the earlier studies. The poll found large majorities of managers reporting that the costs of making accommodations are indeed not expensive and certainly not prohibitive.

Finally, some have argued that "mom and pop" grocery stores and corner drugstores will be saddled with the duty to make extensive and prohibitively expensive modifications of their premises to achieve accessibility. They have stated that there are onerous and excessive burdens which may be faced by small providers. Such hypotheticals are based upon serious misunderstandings of Section 504 and its applications. Small businesses that do qualify as recipients of Federal financial assistance are subject to the small provider exceptions of Section 504. Furthermore, Section 504 requires only reasonable modifications to be made.

Finally, we believe that many small businesses want to accommodate people with disabilities. I grew up in a small community in northwestern Oklahoma, and most of the businesses in that community could be characterized as small businesses. Our family depended on those small businesses, as did everyone else in that rural community. The small businesses and providers in that community made many accommodations for people with disabilities and they did so voluntarily; they did so with the best intentions.

We believe that most employers and providers do not intentionally want to discriminate against people with disabilities. The fact is that they occasionally do discriminate, and when they do, people with disabilities should be protected by law against such discrimination.

In the Council's view, our entire society benefits from initiatives to secure increased opportunities for persons with disabilities. At the very least, citizens with disabilities have a right to expect that existing provisions be restored to the scope of coverage that they had prior to the Grove City decision.

Thank you very much. I would be happy to answer any questions.

Senator MIKULSKI. Thank you very much for that very thorough testimony.

[The prepared statement of Mr. Frieden follows:]

STATEMENT OF: THE NATIONAL COUNCIL ON THE HANDICAPPED

BY: LEX FRIEDEN, EXECUTIVE DIRECTOR

BEFORE THE: U.S. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

DATE: APRIL 1, 1987

The National Council on the Handicapped appreciates this opportunity to present its views on the principles espoused in the proposed Civil Rights Restoration Act. The views I am expressing today are those of the Council and not the Administration. The Administration's views will be presented by the Departments of Justice and Education. As you are aware, the Council is an independent Federal agency comprised of 15 members appointed by the President and confirmed by the Senate. Congress has statutorily charged the Council with reviewing all laws, programs and policies of the Federal Government which affect persons with disabilities and making such recommendations as it deems necessary to the President, the Congress, the Rehabilitation Services Administration, the National Institute on Disability and Rehabilitation Research, and other Federal agencies and officials. Although many government agencies relate to the needs and concerns of people with disabilities, the National Council on the Handicapped is the only Federal agency with such cross-cutting responsibility for disability issues -- regardless of age, disability type, employment potential, economic need, or other individual circumstances.

In its 1986 report to Congress and the President, Toward Independence, the Council commented on the central premise of the proposed Civil Rights Restoration Act:

> ... any person or agency that wishes to obtain Federal grant funds should be required to avoid or cease discriminating in all of its activities. Conversely stated, the Federal Government should not provide financial assistance to any person or agency that engages in discrimination in any part of its operations or activities.
> (Topic Paper on "Equal Opportunity Laws," Appendix, p. A-9)

In pursuing its statutory mandate of advising the Congress and the President on disability issues, the Council has held forums with people with disabilities all around the country. Time after time, individuals with disabilities have told the Council about the egregious discrimination they encounter in their daily lives -- discrimination in jobs, in elementary and secondary education, in higher education, in health services, in recreation, in transportation, in housing, in public accommodations, in obtaining the benefits of public programs and services, and in virtually every other facet of American life. On numerous occasions, Americans with disabilities have declared to the Council that their number one priority is for strong and comprehensive civil rights laws protecting them from discrimination based upon their disabilities. That such views are representative of Americans with disabilities generally is underscored by one of the findings of the 1986 Harris nationwide poll of disabled Americans; Louis Harris and Associates reported as follows:

> When it comes to how disabled persons should be treated under the law, a near consensus emerges. Three out of every four (75%) disabled persons believe that civil rights laws that protect minorities against discrimination should also protect them. Only 17% disagree.
> (Louis Harris and Associates, Survey of Disabled Americans, p. 112)

The primary Federal statute prohibiting discrimination on the basis of handicap, Section 504 of the Rehabilitation Act of 1973, has had a tremendous impact in reducing discrimination against persons with disabilities. Since the decision of the Supreme Court of the United States in Grove City College v. Bell in 1984, however, the effect of Section 504 has been significantly blunted. In the case of Consolidated Rail Corporation v. Darrone (104 S.Ct. 1248 (1984)), decided on the same day as the Grove City ruling, the Supreme Court announced that the limitations upon civil rights coverage established in Grove City apply to Section 504 cases as well (104 S.Ct. at p. 1255). The Darrone case involved a claim of discrimination in employment. In the Council's opinion, this suggests that the limitations established in Grove City are not confined to the context of higher education.

The Council is aware of numerous types of situations affected adversely by the limitations imposed by the Grove City and Darrone rulings. Examples include:

o A man with multiple sclerosis was fired because of his disability from a job in a state office of probation and parole which receives substantial Federal grants, but not for the specific program in which the man worked.

o A college athlete is not allowed to participate in the intramural basketball program because of a visual impairment; the intercollegiate program of the college athletic program receives substantial amounts of Federal financial assistance and the student is the recipient of Federal student loans.

- A person who once had an epileptic seizure was excluded from a state job because of a rule against hiring people with a history of epilepsy; the department where the job is located receives Federal grants, but these funds cannot be traced directly to the program in which the individual applied for a job.

- A public school teacher is refused a teaching position because she has a visual impairment; the school system receives a variety of Federal funds, which can even be traced to the particular school, but the music department in which the particular job was located does not receive Federal funds.

In each of these situations, the individuals with disabilities would have been protected from discrimination prior to the Grove City decision, but now they are left without recourse under Section 504 against the blatant and despicable acts of discrimination they have suffered.

If our Nation's commitment to equality of opportunity for its citizens is to have any meaning, the Council believes that Congress must restore Section 504 and other civil rights laws to the breadth of coverage that they had prior to the Grove City and Darrone decisions. The Council has noted, in its Toward Independence report, that, even without the Grove City narrowing of the scope of Section 504, persons with disabilities have much less protection against discrimination than under civil rights laws protecting other groups. At some time in the future, the Council intends to provide this Committee with its views regarding a more comprehensive approach to prohibiting the discrimination faced by persons with disabilities. But the Council believes that an absolutely necessary first step is to return the scope of coverage of Section 504 and the other civil rights laws to their status before the Supreme Court's ruling in the Grove City case.

The Supreme Court of the United States has noted recently that discrimination against persons with disabilities is often rooted in "simple prejudice," "archaic attitudes and laws," and "erroneous but nevertheless prevalent perceptions about the handicapped" (School Board of Nassau County v. Arline, slip op. at pp. 4-5). There have been concerns about the implications of the Civil Rights Restoration Act as it applies to discrimination against persons with disabilities.

One concern is that employers are opposed to statutory prohibitions of employment discrimination against persons with disabilities. Louis Harris and Associates recently conducted a national poll of employers (representing equal subgroups of small, medium, and large businesses) to determine their opinions on such issues. By a substantial majority, employers recognized the need and indicated their support for nondiscrimination provisions protecting individuals with disabilities. Three-fourths of company managers interviewed reported that they believe that persons with disabilities often encounter job discrimination, and over 70% stated that civil rights laws should protect persons with disabilities.

A related concern is that it is very burdensome for employers to provide equal employment opportunities for persons with disabilities. The recent Harris poll of employers has reaffirmed prior studies that have consistently found that persons with disabilities make good or better than average employees. Based upon employers' responses, the Harris organization concluded, "Overwhelming majorities of managers give disabled employees a good or excellent rating on their overall job performance," and further, "Nearly all disabled employees do their jobs as well or better than other employees in similar jobs." Employees with disabilities were rated as good or better than their nondisabled counterparts in regard to willingness to work hard, reliability, attendance and punctuality, productivity, desire for promotion, ability to take supervision, and leadership ability.

What about the costs of employing a person with a disability? Are job modifications for employees with disabilities very costly? The Council has examined existing studies of workplace accommodations provided for individuals with disabilities and concluded that accommodations are usually minor and inexpensive (see Toward Independence, Appendix, p. A-48). A 1982 Department of Labor study of workplace accommodations concluded that accommodation is "no big deal." The Harris poll of employers verifies the results of the earlier studies; the poll found large majorities of managers (approximately 75%) reporting that the costs of making accommodations are not expensive. While nearly one-half of companies reported that they had made some worksite modifications, an overwhelming majority stated that the costs of accommodations rarely drives the cost of employing a person with a disability above the average range of costs for other employees.

Some have argued that "Mom and Pop grocery stores" and "corner drugstores" will be saddled with the duty to make extensive and prohibitively expensive modifications of their premises to achieve accessibility for persons with disabilities. Such hypotheticals are based upon a serious misunderstanding of Section 504 and its application. In the first place, Section 504, with or without the Restoration Act, applies only to recipients of Federal financial assistance. Suggestions that the acceptance of food stamps could trigger the application of Section 504 are totally groundless. The Council has never heard nor been apprised of any case in which Section 504 coverage was predicated upon the receipt of food stamps by a small business.

Secondly, those small businesses that do qualify as recipients of Federal financial assistance are subject to the "small provider" exceptions of Section 504. Since their original issuance, Section 504 regulations have included provisions exempting small providers (i.e., agencies with fewer than fifteen employees) from certain requirements, including the obligation to make significant alterations to existing facilities to achieve accessibility and to comply with recordkeeping and reporting requirements. This exception for small providers is specifically retained in the current version of the Restoration Act as it relates to Section 504.

The specter of Section 504 placing onerous and excessive burdens upon small businesses is further dispelled when one understands that Section 504 only requires reasonable modifications. Both the regulations and the court cases that have applied Section 504 have made it clear that the statute only requires the making of reasonable accommodations and alterations for the benefit of an individual with a disability;

unduly burdensome or unreasonable changes are not required by Section 504.

Finally, the Council wishes to note that many businesses, including Mom and Pop grocery stores and corner drugstores, have been willing to make their facilities accessible to and usable by persons with disabilities. Such changes have not proven to be exorbitantly expensive nor disruptive to business. Making facilities architecturally accessible benefits not only persons with disabilities but also many other customers, including elderly individuals, people pushing strollers and shopping carts, pregnant women, and many others. The Council is aware that many States and local governments have seen fit to mandate architectural accessibility as part of their building codes and ordinances. Obviously, architectural accessibility is not an impossible or unachievable goal.

In the Council's view, our entire society benefits from initiatives to secure increased opportunities for persons with disabilities. At the very least, citizens with disabilities are entitled to have Section 504 -- the primary statute that protects them from discrimination -- restored to the scope of coverage that it had prior to the Grove City decision.

Senator **Mikulski**. I have for you, Mr. Frieden, two questions, one from Senator Weicker and one from Senator Harkin, and then a question for you, Mr. Conway.

Mr. Frieden, a question for you from Senator Weicker. He asks, "Lex, we heard from Mr. Disler, representing the Department of Justice, earlier this morning that the Administration is proposing its own bill to address the Grove City decision which does not appear to address all the adverse implications of Grove City. Among other problems, their bill does not provide for institution-wide coverage of discrimination against the disabled. Now the question. Given the Council's role as an independent Federal agency charged with advising the Administration and Congress on disability policy, were you involved in the development of the Administration's Grove City bill?"

Mr. **Frieden**. In our report to the President and to the Congress last year, "Toward Independence", the Council did offer recommendations on these matters to both the Administration and the Congress. More recently, the Council has advised the Justice Department of our desire to work further on developing legislative proposals based on the recommendations contained in that report.

We have not been informed by the Justice Department of work proceeding on the development of an Administration bill and have not had the opportunity to contribute to the development of that bill thus far.

If we did have the opportunity, I would say that our recommendations would be consistent with those offered here today.

Senator **Mikulski**. Thank you, but in summary the answer is "No" to Senator Weicker's testimony; is that correct?

Mr. **Frieden**. That is right.

Senator **Mikulski**. The reason I am asking for Senator Weicker and Senator Harkin, as you know, they have been probably the foremost advocates in developing constructive domestic public policy for handicapped persons. Senator Weicker's championship is, I think, well-known; and Senator Harkin chairs our Subcommittee on the Handicapped on this Committee. He wanted me to ask you this. He went back to the Conference Report accompanying the 1974 Amendments that explained that Section 504 was enacted to prevent discrimination against all handicapped individuals, whether that be in employment, health, or any other Federally aided program.

What he then goes on to say is that, "Today, almost every agency that provides Federal financial assistance has issued regulations to implement 504." Then he says, "Is the need to prohibit discrimination in employment, as well as in the receipt of the services by intended beneficiaries of Federal assistance as valid today as it was 13 years ago? And is the need to prohibit discrimination by all Federally aided programs, not simply education programs, as valid as it was 13 years ago?

Mr. **Frieden**. Absolutely there is no doubt that the need to prevent discrimination any time it occurs in this country is as valid today as it was 13 years ago. The Council is aware that many agencies of the Federal Government have promulgated regulations under Section 504. And we believe that many people with disabilities have benefitted from the provisions in Section 504 and the implementation of those provisions by Federal agencies.

However, discrimination continues to occur, and we need to provide legislative protection for people with disabilities who do face discrimination in employment, in education, in the receipt of benefits from Federal programs and so forth.

Senator **MIKULSKI**. Thank you.

Mr. **FRIEDEN**. Thank you.

Senator **MIKULSKI**. Mr. Conway, I want to go on to your concerns about business, which of course is a concern of mine. I grew up in a family where my mom and dad operated a small neighborhood grocery store of the kind described by Mr. Frieden in his testimony. My grandmother ran a "Famous Mikulski's Baker Shop" so we are small business people.

My question to you is what does NAM think the pre-Grove City coverage was, and what is the basis for that conclusion? In other words, take for example on page 4, and tell the Committee by citing specific Grove City interpretations why you—you meaning NAM—believe this bill goes beyond that coverage.

Mr. **CONWAY**. Senator, are you referring to the JTPA example?

Senator **MIKULSKI**. Yes, and then some of the others.

Mr. **CONWAY**. Well, number one, the pre-Grove City coverage did not single out specific industries. I mean, that is the starting point. If you were engaged, for instance, principally in health, you were not covered just because of that industry.

Number two, there seems to be under this bill kind of a focus on how you participate in a program. If you receive the grant, or you participate as a whole—which has been talked about a lot today—then you are going to be covered wherever your facility is. Whereas if you were a very large, let us say, organization that was, say, baking bread, and you received Federal aid at just one locale, one plant, only that one plant would be covered according to this proposed legislation. As I understand it, that is a much more different scenario than was present before Grove City.

Grove City only spoke, after all, toward the program-specific Title IX finding. That is why we feel that these new nuances are an expansion, and not merely a restoration of the law.

Senator **MIKULSKI**. Well, what is the reason that you think this is now different?

Mr. **CONWAY**. As I said, for instance, there are specific industries that are going to be covered no matter what type of assistance or program they participate in. That is different.

Also there is a focus on the manner of participation in the program. That is different. If you participate as a whole, you are covered as a whole. If you just participate at one locale, just that one locale. So that is different as well.

Senator **MIKULSKI**. Senator Weicker, we welcome you to the Committee, and I extended to Mr. Frieden your warm welcome and even asked your question for you.

Senator **WEICKER**. Thank you. We see so much of each other, he does not want to hear me talk, and I do not want to hear him talk. [Laughter.]

Senator **MIKULSKI**. Senator Weicker, did you have some questions you wanted to ask?

Senator WEICKER. I might have some questions for the record. Thank you.

Senator MIKULSKI. Well, thank you. I think that answers our questions, and we thank you for participating in today's hearing.

We would now like to move to Panel 5. We welcome the following witnesses: Elaine Jones, with the NAACP Legal Defense Fund. Elaine has been here several times to assist the Congress in civil rights issues, and we appreciate her expertise. We also welcome Arlene Mayerson, with the Disability Rights Education and Defense Fund, and John Garvey, from the University of Kentucky.

Ms. Jones—we will go according to seniority of appearance here. Why don't you lead it off?

STATEMENTS OF ELAINE JONES, ESQ., NAACP LEGAL DEFENSE FUND, WASHINGTON, DC; ARLENE MAYERSON, ESQ., DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, WASHINGTON, DC; AND JOHN GARVEY, UNIVERSITY OF KENTUCKY, LEXINGTON, KY

Ms. JONES. Thank you very much, Senator Mikulski.

I am testifying today on behalf of the NAACP Legal Defense Fund, and my testimony focuses on Title VI of the Civil Rights Act of 1964 as it is covered by this legislation, and that particular coverage appears at Section 6 of the bill, at page 8.

I would like to request that my statement be submitted for the record, and would like to simply just make a few points about the bill and some of the comments that I have heard today, if I might.

Senator MIKULSKI. Without objection, so ordered. And we would hope your comments will not be longer than your testimony.

Ms. JONES. No, no. That is a promise.

We know that Title VI prohibits discrimination on the basis of race, color and national origin in any program or activity which receives Federal financial assistance.

Now, I listened to Mr. Disler's testimony today from the Department of Justice, and he made three or four statements that I just feel compelled to respond to.

The first is, he said there is no need for this coverage outside of education. Now, what I find interesting is that if we had not had the broad coverage of Title VI in the Sixties, outlined in paragraphs 2(a) and (b) of the bill, that is codified now in 2(a) and (b) of the bill, we would not have been able to demonstrate to Mr. Disler the need for the coverage in education. Because we have had it, and the coverage has been broad, we have been able to show over the past 20 years the discrimination, the systemic discrimination in systems of higher education.

Now, yes, it has been broadly applied. If you look at an appendix to my testimony which is Exhibit A—the testimony itself is only seven pages—the exhibit is a letter to Governor James of Alabama that was sent to him, a letter of findings that was sent to him after a compliance review of the statewide system of higher education in Alabama. There was no search for where the money went, which institutions got it, which programs received funds. All that was known is that money went to the Alabama system of higher education. It was a statewide, broad-based review of all of the colleges and universities in the State.

That letter is attached, which is a letter of findings of OCR once that review was completed. That review and its findings resulted in a successful lawsuit to desegregate the Alabama system of higher education which was won this past year in 1986.

Attached also is Exhibit A-2, which is a letter to the Governor of Ohio, concerning also an OCR systemwide investigation of the higher education system in the State of Ohio. August 15, 1979 is when the review was conducted. Mr. Disler says "program or activity" is less than an institution. It is clearly more than an institution, depending on the nature of the violation. In higher education, it has been several institutions.

Now, the next point that I want to address is his statement that there is clearly no demonstrated need in other areas. He could not be more wrong. Look at the area of health and health care. Title VI has done a great deal to desegregate public health facilities and to equalize quality of treatment.

I mean, recently we had a case—and it was a Title VI review, the runaway hospital case in Gary, Indiana involving a plan to take the hospital that primarily served black citizens in the City of Gary, Indiana and move it out to suburbia, with no transportation, no access for a predominantly black community. That is Title VI jurisdiction. That is going at that time the Department of Health, Education and Welfare conducted making them do a compliance review, not only of that hospital but of the other public health facilities there in Indiana and Gary, to see what impact the moving of that hospital would have on the black population. That compliance review was done; it was broad-based, and as a result of that review, a compromise was reached. The hospital was not permitted to move in toto. It was only able to move certain facilities. It had to keep the oncology unit, the pediatrics unit and a couple of other units right there in the City of Gary. Also, transportation facilities had to be provided. That is due in part to broad Title VI jurisdiction.

Nursing homes and health care are areas of present use of Title VI. Look at the Hillhaven Corporation in Seattle. This is a corporation that owns a consortium of nursing homes. Each nursing home had to be certified for Medicare and for Medicaid.

Civil rights compliance under Title VI, and section 504 had to be done in order for the corporation to receive certification. It was corporate-wide—not one nursing home, not two nursing homes, but every nursing home in the corporation. And you talk about paperwork—Hillhaven Corporation preferred corporate-wide coverage because this way they would not have to proceed nursing home by nursing home. They preferred for OCR to look at the entire operation at once and do the compliance review at once so they could get the certificate to do business for all of the nursing homes. That is important.

Now, that agreement was entered into in August 1984, right after Grove City, before Brad Reynolds made the announcement that he was going to interpret Grove City and apply it to Title VI as well. Nothing like that has happened since then.

Now, one other statement on housing—there is a need in housing as well. We need broad coverage in housing. We see what is happening more and more with people, poor folk, minorities, being displaced. HUD must enforce under Title VI, because they do not have any enforcement authority under title VIII. HUD must go and look at some of these housing units to determine what the level of Federal involvement is necessary in terms of loan guarantees and others issues to see what sort of protections we can get for those people.

So the list goes on. One other thing Mr. Disler said that just made me stop in my tracks——

Senator **Mikulski**. Ms. Jones, how many more points do you wish to make?

Ms. **Jones**. Two brief ones.

First, he said "do not provide coverage unless and until there is a demonstrated need." I think that turns civil rights protections on its head. He is forgetting the important public policy at stake here, which is to make sure that Federal funds are not used in a way that discriminates against covered and protected groups. He says wait until discrimination occurs; then we will see if there is a need, and then we will come in and seek coverage. I tell him that is not the public policy that Congress adopted when it first passed Title VI in 1964.

Final point. Prior statements about how we support civil rights, and people are entitled to civil right, and we believe in nondiscrimination, fall on deaf ears as far as I am concerned when the next statement is, "Well, but do not apply it to me. Let me have Federal funds, and let me be involved and take Federal money, but it is too much paperwork, or it is too much of a burden."

And I say that we have an obligation here, when you decide—to drink at the public trough, when you decide to use Federal funds, there are certain obligations that flow from that. It reminds me of the arguments made when Title II was passed in 1964, about how businesses and individuals have a right to serve whom they choose. The argument was made when Title VII was passed about States' rights, and we really should not interfere with businesses' rights to hire who they want.

That is all I have to say, Senator Mikulski. Those are my comments on what Justice has to tell us.

Senator **Mikulski**. Ms. Jones, you are an eloquent spokesperson.

Ms. **Jones**. Thank you.

[The prepared statement of Ms. Jones and responses to questions submitted by Senator Hatch and Thurmond follow:]

Legal Defense Fund

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Statement of

Elaine R. Jones

On Behalf of

The Legal Defense and Educational Fund, Inc.

Before the
Committee on Education and Labor

Concerning
S.557,
The Civil Rights Restoration Act of 1987

April 1, 1987

I would like to thank the Committee for this opportunity to testify on behalf of the the NAACP Legal Defense and Educational Fund, Inc. The Legal Defense Fund strongly supports prompt enactment of S. 557, "The Civil Rights Restoration Act of 1987." This legislation would amend four federal civil rights statutes to counter the effects of the Supreme Court's recent decision in

Contributions are deductible for U.S. income tax purposes
The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget

Grove City College v. Bell, 104 S.Ct. 1211 (1984). My testimony today will focus on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

The Legal Defense Fund ("LDF") specializes in protecting and advancing the rights of black Americans in employment, education, voting, housing, criminal justice and health matters. The organization has for four decades used the law to advance civil rights gains, participating in virtually every important case, and winning hundreds of victories in the Supreme Court.

Education and health matters have been areas of particular concern to the Legal Defense Fund. The Legal Defense Fund's efforts to secure equal educational opportunity for black Americans dates back to the litigation that resulted in the landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954). Despite Brown and subsequent cases, equal opportunity in education is far from a reality. The continued existence of private segregated academies that receive federal aid and federal tax relief undermine support for financially-strapped public education systems and inhibit desegregation. Thirty years after the Brown decision, the education of many black students is both "separate" and "unequal."

The Legal Defense Fund has had a longstanding commitment to ending discrimination in health care. Historically, we have challenged segregation in hospitals and other health facilities and have sought to obtain, through litigation, legislation and regulation, the guarantee of equal access to health care. In

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964) which challenged the legality of Hill-Burton grants and loans, 70 % of which went to the construction of hospitals and the remainder to other health facilities such as nursing homes, the Legal Defense Fund successfully challenged the "separate-but-equal" policy of the program.

In the health care area, equal access for black persons is still far from a reality. Hospital relocations from and closures in black neighborhoods have increased barriers to access to care. Because hospitals are often the source of primary care for poor blacks, hospital closures and relocations mean that an important source of primary care is lost and that even fewer health professionals remain to serve the community. Increased travel time and expense make it likely that poor black families defer obtaining medical care until their need is extreme.

II. Public Policy

Title VI has been used extensively since its enactment to achieve fair and equal treatment for black students. Prior to enactment of Title VI, expensive and time-consuming litigation against individual school districts was required to implement the Brown mandate. Dramatic gains in school desegregation were achieved after 1964 largely because of the enforcement effort of federal agencies. In the early days of Title VI's existence, federal assistance was terminated for over 200 local educational agencies. However, despite their initial recalcitrance, all of these agencies have again achieved eligibility for federal aid. Countless other schools and school systems were brought into compliance without resort to the drastic step of fund termination.

The passage of Title VI has made a significant difference in the access of blacks to health care. Hospitals are no longer rigidly segregated as many were years ago. Because of Title VI, hospitals, in order to participate in the Medicare and Medicaid programs, had to cease such practices as officially segregating patients, restrooms, and labeling blood by race.

In the private sector as in the public sector, problems in the corporate area have largely been challenged in the context of employment rather than by challenging discrimination in the extension of services. Limitations in the provisions of the federal funding statutes (e.g., §604 which limits Title VI coverage of employment to federal programs where employment is a "primary objective"), the availability of employment-related remedies such as Title VII and Executive Order 11246 dealing with government contractors, and inadequate federal enforcement have meant that the use of Title VI in the corporate sector has not been as well documented as have other statutes. However, the evidence points in one direction: no difference was contemplated for corporations in the broad range coverage schemes adopted by the regulations implementing Title VI.[1]

There are analogous areas of law which support corporate-wide coverage. For example, Executive Order 11246 is broad in its coverage. If one construction site of a corporation with operations in other parts of the nation receives federal contracts, all of the construction employees of the corporation are subject to the requirements of the Order, whether or not assigned to a federally-assisted construction site.[2]

Similarly, if a private hospital corporation owns health facilities around the nation it is very difficult to understand why only the facility that receives federal assistance should be required to meet the basic requirement of treating patients in a nondiscriminatory manner.

Title VI indeed has resulted in substantial progress, but the need for a strong and effective statute is still vital in 1987. In health care, a major problem continues to be a scarcity of physicians to serve Black patients. In large part because of historical and lingering discrimination, minority physicians continue today to serve primarily minority patients. Yet disproportionately few Black or other minority persons have completed medical school.

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[1] See Organization of Minority Vendors v. Illinois Gulf Central Railroad, 579 F.Supp. 574 (N.D. Ill. 1983); Marable v. Alabama Mental Health Board, 297 F.Supp. 291, 298 (M.D. Ala. 1969).

[2]

> This part applies to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of $10,000. The regulations in this part are applicable to all of a construction contractor's or subcontractor's construction employees who work on a non-Federal or nonfederally assisted construction site. . Affirmative Action Compliance Manual, No. 89, Text 281 (1986).

Another contributor to lack of access has been the limited willingness of the medical community to treat Medicaid patients and the reluctance of many hospitals either to give staff privileges to doctors who accept Medicaid patients or to admit patients who do not have a private doctor on staff.

In education, areas still remain in which Title VI as amended in S.557 can be of great help. As stated earlier, schools continue to exist that provide black students with "separate" and "unequal" education. In higher education, while many States have submitted remedial plans, severe problems in implementing those plans remain. Vigorous enforcement by the Department of Education is critical.

III. Impact of Grove City

Grove City College v. Bell, 104 S.Ct. 1211 (1984), when applied to Title VI, substantially undermines the statute's continued usefulness in combatting racial discrimination. Pre-Grove City Title VI was applied without consideration of where the funds were being used. Attached to this statement are letters of findings that serve as examples of how Title VI prior to Grove City was used to conduct systemwide investigations of higher education in Alabama and Ohio. (Exhibit A). These reviews were conducted absent consideration of whether a particular school or specific program received federal funds or not. The comprehensiveness of the pre-Grove City review of higher education in Alabama was critical to the successful prosecution of a lawsuit to desegregate the Alabama higher education system.

After Grove City, scarce and limited resources must be used to trace where federal funds are utilized to determine what departments, agencies or programs are subject to Title VI. Consequently, Title VI no longer fulfills its role as a protector against discrimination by recipients of federal financial assistance. Instead, Grove City serves to insulate the institutional recipients from the Congressional policy originally intended, to assume that Federal financial assistance does not subsidize discrimination.

In conclusion, S.557 would restore the practice that existed prior to Grove City, and thus restore to Title VI Congress' original intent. Immediate passage of this legislation is needed to ensure that both public and private institutions which received Federal financial assistance are required to adopt and adhere to a policy of non-discrimination in all of its activities. discouraged from discriminating on the basis of race.

April 30, 1987

The Hon. Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C.   20510

RE: Grove City Questions

Dear Senator Kennedy:

Enclosed please find my response to the questions propounded in writing to me by Senator Hatch and forwarded by your office. Would you please ensure that Senator Hatch promptly secures a copy of the enclosed responses?

Sincerely,

Elaine R. Jones

Elaine R. Jones

806 15TH STREET, N.W.,   SUITE 940   (202) 638-3278   WASHINGTON, D.C 20006

Questions for Elaine Jones

1. The NAACP Legal Defense and Educational Fund, Inc., co-authored a document entitled "Injustice Under the Law: The Impact of the Grove City College Decision on Civil Rights in America." It was made a part of the record of the hearings on Grove City legislation in the House of Representatives in 1985. In that document, you state that one of the potentials for discrimination under Section 504 after Grove City is that "[a]irlines which use federally subsidized airports and federal air traffic controllers" would be able to discriminate against disabled people in the airplane. In Department of Transportation v. P.V.A., the Supreme Court rejected the position that the airports or the federal air traffic controller system constituted aid to the airlines within the meaning of Section 504. Assuming that you are correct that before Grove City airlines using federally subsidized airports and federal air traffic controllers were covered under Section 504, what provisions of S. 557 would "restore" such coverage?

2. Would these provisions also cover shipping companies using federally assisted airports? If your answer is no, please explain why such companies would not be covered under S. 557?

3. Would these provisions also cover businesses using highways built with the use of federal aid? If your answer is no, please explain why such companies will not be covered under S. 557.

4. Will the definition of "recipient" in current federal agency regulations implementing these statutes remain in effect if S. 557 is adopted?

5. On page 2 of S. 557, reference is made to "certain aspects of recent decisions and opinions of the Supreme Court" that have unduly narrowed or cast doubt upon the broad application of the four statutes addressed in S. 557. Would you please explain the aspects and the decisions which are being referenced by this language?

6. Should inclusion of the language found on page 2, lines 13 through 16, be interpreted as codifying, approving or sanctioning all existing federal regulations, rules and opinions interpreting the four laws addressed in S. 557.

7. If your answer to the previous question was yes, how then does inclusion of this language square with the assertion that S. 557 is intended only to address the scope of federal regulatory authority of the four statutes addressed in the bill?

8. In its prepared testimony, the Department of Justice cites a series of cases which it believes support the proposition that the four statutes addressed in S. 557 were interpreted to be program specific prior to the Supreme Court's decision in Grove City. Do you agree with the Department characterization of those cases. (The case names are attached and can be found in footnote 2.)

If your answer is no, please explain your different interpretation of these cases?

9. If the purpose of S. 557 is to return the law to what it was prior to the Grove City decision, then what would be the precedential value of these cases upon enactment of S. 557?

10. Please explain the meaning of the phrase, "and each other entity," which is found, for example, on page 3, paragraph (1)(B) of S. 557?

11. What is the correct interpretation of subsection (4) found, for example, on page 9 of S. 557, which refers to "any combination comprised of two or more of the entities described in paragraph (1), (2), or (3)?

12. Would you give an example of the type of entities covered by subsection 4?

13. Would an entire church, such as the Catholic Church, be a "combination" as the word is used in section 4 if two or more parishes are recipients of financial assistance?

14. Would subsection 4 require coverage of an entire state government if two or more agencies, offices or divisions of that government received assistance?

15. Please explain the statutory language which, prior to the decision by the Supreme Court in Grove City, authorized treatment of organizations principally engaged in the business of providing education, health care, housing, social services, or parks and recreation in a manner different from other organizations?

16. Would you please provide an example of the type of business that would be covered under subsection (3)(A)(i), found on page 9 of S. 557, and the federal assistance that would result in such coverage?

17. Please explain who is and is not covered by the term "ultimate beneficiary" found in section 7 of the bill?

18. In interpreting section 7 of the bill, are ultimate beneficiaries of federal programs enacted after adoption of S. 557 excluded from coverage under the four statutes addressed in legislation?

In Grove City, the Supreme Court decided that federal education aid to a student constitutes Federal financial assistance to the college, even though the college received no direct federal aid. The Court also ruled that because the student grants funded only the college's student aid program, it was that "program or activity", not the entire educational institution itself, that was covered by the antidiscrimination provision.

The second ruling, the program-specific ruling, broke no new legal ground. The coverage of the federally-aided program rather than the entire institution merely reflected the more persuasive reading of the plain language of Title IX (and the other three cross-cutting statutes). 1/ Similarly, Title IX's legislative history supports the Supreme Court's program-specific reading of its scope. And, the weight of caselaw before Grove City favored the program-specific reading. 2/ Nonetheless,

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1/ The Department of Education had not been adhering to this programmatic limitation prior to 1984.

2/ Compare, e.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) (Federal scholarship and loan aid to a college subjects only the college's student aid program to Title IX coverage), vacated and remanded in light of Grove City College v. Bell, 466 U.S. 901 (1984); Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982) (reaffirming earlier decision holding that Title IX is program-specific); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) (assistance provided to the Harvard Law School financial aid program, apparently through a college work-study program, does not constitute assistance to the entire law school educational program: Title IX complaint

(FOOTNOTE CONTINUED)

the Administration believed that there were sound policy reasons for congressional consideration of a measured and tailored legislative response to the Grove City decision, one that provided for institutional coverage under Title IX and the other three cross-cutting statutes of all educational institutions receiving Federal financial assistance. We support such legislation in the 100th Congress as we did in the last two Congresses.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

must allege discrimination in the particular assisted program within the institution), cert. denied, 456 U.S. 928 (1982); Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981) ("on the basis of the language of Section 504 and its legislative history, and on the strength of analogies to Title VI and Title IX, we hold that it is not sufficient, for purposes of bringing a discrimination claim under Section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff . . . must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefitted by federal financial assistance") (footnotes omitted); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (Federal aid to a company's work training program subjects only that program, not the entire company, to Section 504 coverage); Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257 (D. N.J. 1983) (Federal aid to conduct seminars on alcohol abuse does not bring the society's activity of certifying medical technologists within Section 504 coverage); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (University's intercollegiate athletic program not subject to Title IX coverage because it did not receive Federal financial assistance), with e.g., Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982) (Title IX); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980) (Section 504); Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Title VI).

April 30, 1987

Responses to Written Questions
Submited by Senator Hatch
Re Proposed Grove City Legislation, S. 557

1. In my view, S. 557 does not define what constitutes federal financial assistance. The definition of federal financial assistance is in existing agency regulations. The Supreme Court in Department of Transportation v. P.V.A. (No. 85-289, 6/27/87), determined that federal financial assistance to airports did not constitute federal financial assistance to airlines. Nothing in S. 557 would change that.

   It must be noted, however, that in 1986 Congress passed the Air Carrier Access Act providing that airlines may not discriminate against disabled persons.

   The document entitled "Injustice Under the Law: The Impact of the Grove City College Decision on Civil Rights in America" was published by the NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union in 1985, before the P.V.A. case was decided by the Supreme Court.

2. No. S. 557 would not make shipping companies recipients of federal financial assistance by virtue of their use of federally-assisted airports. See answer to question #1.

3. No. Prior to Grove City businesses using highways built with federal assistance were not recipients and would not become recipients by virtue of the passage of S.557.

4. Yes.

5. The preamble of the bill includes language found in Grove City College v. Bell, 465 U.S. 555 (1984) and Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

6. The language referred to are not substantive interpretations of the statute. The language explains the purposes of the legislation and refers only to regulations, rules and opinions dealing with broad coverage of the statutes.

7. Not applicable.

8. I do not agree with Deputy Assistant Attorney General Mark R. Disler's assesesment of the weight of case law prior to Grove City College v. Bell, 465 U.S. 555 (1984). My research demonstrates that the weight of the case law clearly supports broad interpretation of the coverage afforded by the four civil rights statutes, notwithstanding the 7 cases cited by Mr. Disler in support of his position.

Numerous Federal Courts of Appeals and District Court decisions have been premised on broad interpretations of th breadth of coverage.

> United states v. El Camino Community College District, 454 F. Supp. 825 (C.D. Cal 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (the Department of Health, Education and Welfare may investigate an entire College's compliance with Title VI regardless of the funding to specific programs in the College)
>
> Flanagan v. President & Directors of Georgetown College, 417 f. Supp. 377 (D.D.C. 1976) (title VI covers law school's privately funded stgudent financial aid resources because school is housed in structure built with federal financial assistance)
>
> Board of Public Instruction of taylor Co. v. Finch, 414 F.2d 1068 (5th Cir. 1969) (assumes basic Title VI coverage of the entire school district, limitations are placed only on the funds to be terminated under Sec. 602)
>
> Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (Veterans Administration educational grants for students are aid to the university as a whole)
>
> Serna v. Portales Municipal Schools, 499 F. 2d 1147 (10th Cir. 1974) (national origin discrimination under Title VI and the Constitution brought by Spanish surnamed parents and students involving curriculum content, employment discrimination, and services to rectify language deficiencies -- the Court held that

under Title VI, the appellees have a right to bilingual education, yet there was not inquiry into the amount or type of federal funding or how it was used in the district)

United States v. Jefferson Co. Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385, cert denied sub nom Caddo Parish Board of Education v. United States, 389 U.S. 840 (1967) (Order for desegregation suit under Title VI covers student participation in all aspects of school life, including extracurricular activities, athletics, etc., without inquiry into which activities were federally funded.

Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) (suit to force integration of school system for children of Black air force based personnel -- school system received nearly $2 million in federal aid between 1951 and 1964. "The Bossier Parish School Board accepted federal assistance in November 1964, and thereby brought its school system within the class of programs subject to the Section 601 prohibition against discrimination." 370 F.2d 852 (Emphasis supplied.)

Yakin v. University of Illinois, 508 F. Supp. 848 (N.D. Ill. 1981) (graduate student sued for national origin discrimination when he was terminated from the doctoral program in the psychology department. As long as the University received federal financial assistance, it was unnecessary for the student to prove his department or program received federal assistance)

Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), aff'd, 688 F.2d 14 (3rd Cir. 1982) (Intercollegiate athletic program which does not receive federal funding earmarked for athletes nonetheless is covered under Title IX)

Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982) (because all of a college's departments benefit when a entire institution must be considered the 'program or activity' under Title IX)

Wolff v. South Colonie Central School District, 534 F. Supp. 758 (N.D.N.Y. 1982) (rights of disabled student to participate in school trip are covered by Section 504, without proof of federal funding for school trips)

Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980) (high school student with only one kidney is entitled to wrestle, without proof of federal funding for high school athletics)

Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (undergraduate with sight in only one eye secures right to play football, without proof that the University receives federal funding for athletics)

Doe v. Syracuse School District, 508 F. Supp. 333 (N.D.N.Y. 1981) (no review of the nature of federal funding necessary prior to evaluating employment practices of school district which had a discriminatory effect on the application of a teacher)

Garrity v. Gallen, 522 F. Supp. 171, 212-13 (D.N.H. 1981) (the Court found the entire Lanconia State School was covered for Section 504 purposes)

Until 1982 only one court of appeals had interpreted Title IX as narrowly as the Grove City decision. (Rice v. President and Fellows of Harvard College, 663 F.2d 336, (1st Circ. 1981). Only two courts of appeals had read Section 504 so narrowly (Brown v. Sibley, 659 F.2d 760 (5th Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980). No court had suggested that either Title VI or the Age Discrimination Act was so narrow.

Moreover, some cases which hold only that the termination provision is narrow have been misconstrued to apply to coverage as well. A case cited by Mr. Disler, Dougherty County School System v. Bell, 694 F.2d 78 (5th Cir. 1982), should be cited as a case which held that the termination provision is narrow and not that the prohibition against discriminaion is program-specific.

In Lau v. Nichols, 414 U.S. 563 (1964) in deciding whether the denial of needed special English instruction to Chinese students was a Title VI violation, the Supreme Court noted merely that the San Francisco school district "receives large amounts of federal financial assistance..." The Court did not indicate any concern about whether specific programs of English instruction received federal funds.

9. The holdings in these cases will be overruled by passage of S.557 to the extent they follow substantially the program-specific holding in Grove City.

10. The phrase "and each other entity" includes any state government unit which is not a "department or agency," e.g., a school board or a water board.

11. Examples of subsection (4) are: the TVA, a regional o

metreopolitan transit authority, or a metropolitan planning commission.

12. See answer 11.

13. No.

14. No.

15. Prior to Grove City, these corporations were not treated differently from other corporations. My view is that coverage has always been corporate-wide. In the interest of passing the Civil Rights Restoration Act however, the bill's sponsors have agreed to limit coverage for most corporations to be plant-specific. Corporations principally engaged in business of providing education, health care, etc. however, are covered in their entirety because of their unique public functions.

16. One such example is the Chrysler bailout.

17. The definition of recipient provides that "such term does not include any ultimate beneficiary under any such program." E.g., 34 C.F.R. Sec. 100.13 (i) (Title VI Department of Education). Students, for example, are "ultimate beneficiaries" and not "recipients" of federal financial assistance.

18. Yes.

Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

806 Fifteenth Street, N.W., Suite 940
Washington, D.C. 20005 • (202) 638-3278

April 30, 1987

The Hon. Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C. 20510

RE: Grove City Questions Submitted by Senator Thurmond

Dear Senator Kennedy:

Enclosed please find my response to the questions propounded in writing to me by Senator Thurmond and forwarded by your office. Would you please ensure that Senator Thurmond promptly secures a copy of the enclosed responses?

We thank you for your leadership on this important issue.

Sincerely,

Elaine R. Jones

Elaine R. Jones

ERJ:vyt

Enclosure

Contributions are deductible for U.S. income tax purposes

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

QUESTIONS BY SENATOR THURMOND FOR MS. JONES

Would you please explain whether the following entities were covered under the four statutes addressed in S. 557 prior to the Supreme Court's decision in Grove City and whether they would be covered upon enactment of S. 557:

a. Grocery stores accepting food stamps;

b. Drug stores filling medicare or medicaid prescriptions;

c. A rancher receiving water at a reduced cost from the Bureau of Reclamation Water Project;

d. A farmer receiving USDA crop subsidies;

e. An apartment owner accepting rental vouchers;

f. A steel mill using water purified in a Municipal Wastewater treatment plant built with EPA assistance;

g. A corporation which conducts vocational education programs which also receives grants for defense related research;

h. A small tool and die business receiving technical aid from state or local government economic development program;

i. A big brother program receiving assistance from student volunteers at a federally assisted college;

j. A church which operates a school that receives Title I assistance;

k. A university-owned commercial or residential building;

l. National political parties;

m. A professional baseball team performing in municipal facilities;

n. Insurance companies administering Medicare or Medicaid programs.

April 30, 1987

Responses to Questions Propounded
In Writing by Senator Thurmond
Elaine R. Jones

In his inquiry, Senator Thurmond listed a collection of entities and requested a response as to which each was covered prior to the Supreme Court's decision in Grove City; also, he inquired as to what effect Section 557 would have on the coverage of each entity.

a. Grocery Stores Accepting Food Stamps

Coverage before: I do not know of any definition regulatory or court determination to the effect that grocery stores accepting food stamps are covered under these statutes. However, since the 1964 Act grocery stores have been covered by Title II of the Civil Rights Act which bans discrimination in public accommodations based on race or national origin.

Even if grocery stores were determined to be covered for the purpose of Section 504, the USDA Section 504 regulations state expressly that small providers (those with 15 or fewer employees) have much flexibility in deciding how to accommodate disabled customers. Thus "Mom and Pop" stores would not be required to undertake costly alterations to accommodate the disabled 7 CFR 156.18.

Coverage after: Remains the same as prior to the Grove City decision. Any person or entity which was not a recipient prior to the Grove City decision does not become a recipient by virtue of the passage of Section 557. Any person or entity which was a recipient before is a recipient now. This bill does not create any new recipients, not does it resolve any unsettled questions about whether a given entity or person is a recipient of federal financial assistance under the civil rights laws.

b. Drug Stores Filling Medicare or Medicaid Prescriptions

Coverage before: Medicare and Medicaid are forms of federal financial assistance. The individual patient is not covered because she/he is an ultimate beneficiary. However, hospitals and nursing homes are covered by virtue of their receipt of Medicaid and Medicare payments. See e.g. U.S. v. Baylor Medical Center, (5th Cir. 1984) Pharmacies filling prescriptions paid for by Medicaid or Medicare are also covered.

Coverage after: No change is caused by the bill. Entities which were recipients prior to Grove City are recipients under the bill. There is no basis to support fears of burdens caused by accessibility because the Justice Department's government-wide Section 504 regulations allow small providers additional flexibility in how they become accessible to disabled customers. 28 C.F.R. 42.521 in 45 FR 37625 (June 3, 1980).

c. Rancher Receiving Water at Reduced Cost From Bureau of Reclamation Water Project

Coverage before: The Rancher is the ultimate beneficiary of the funding statute. Ultimate beneficiaries are excluded from the regulatory definition of recipient.

Coverage after: Section 557 explicitly states that no change is made in who are considered ultimate beneficiaries (Section 7).

d. Farmer Receiving USDA Crop Subsidies

Coverage before: A farmer who receives USDA crop subsidies is an ultimate beneficiary, and not a recipient under USDA regulations.

Coverage after: Section 557 explicitly states that it does not change the definition of an ultimate beneficiary (Section 7).

e. Apartment Owner Accepting Rental Vouchers

Coverage before: The housing voucher program represents the type of federal aid that has always been considered financial assistance. Rent supplement programs are listed as a form of federal financial assistance in the HUD regulations (24 C.F.R. Section 1.1 et seq., App. A) and housing certificates are expressly subject to Title VI (24 C.F.R. Section 882.111).

Coverage after: The legislation does not change the test for who is considered a recipient.

f. Steel Mill Using Water Purified In Municipal Waste Water Treatment Plant Built With EPA Assistance

Coverage before: The Steel Mill is not a recipient of federal financial assistance. A steel mill is no different from any other consumer of water. Those using publicly provided water do not become recipients of federal financial assistance, because the municipal waste water treatment plant may have received a federal grant.

Coverage after: The legislation does not change the test for who is considered a recipient.

g. *Corporation Which Conducts Vocational Education Programs Which Also Receives Grants For Defense Related Research*

Coverage before: Before the *Grove City College* case, when a corporation received federal assistance certain nondiscrimination obligations applied. It was covered by Title VI, Section 504 and the Age Discrimination Act with respect to all its operations [at the establishment which received the assistance,] and all of its education activities were covered by Title IX.

Coverage after: As I understand it, the entire purpose of Section 557 is to return the laws to their pre-*Grove City* requirements.

h. *Small Tool and Die Business Receiving Technical Aid From State or Local Government Economic Development Program*

Coverage before: The regulations have always made clear that federal financial assistance could take the form of technical assistance. However, this has never meant that *any* such technical assistance from a state or local government to a private company constituted federal financial assistance. The tool and Die business coverage described in the question then is not covered, unless the technical assistance constitutes federal financial assistance.

Coverage after: An entity which was not covered prior to *Grove City* is not covered under this bill.

i. *Big Brother Program Receiving Assistance From Student Volunteers At A Federally Assisted College*

Coverage before: None of the statutes or applicable regulations indicate that the assignment of volunteer help constitutes federal financial assistance. The Title VI regulations do make clear that "federal financial assistance" may take the form of "the detail of Federal personnel" or work performed by "employees" of the recipient of Federal financial assistance. But these provisions do not cover the use of *volunteers*, (see e.g. 7 C.F.R. 15.2 (a) and (k), Agriculture Department regulations).

Coverage after: The legislation would not change the recipient status of any entity.

j. Church Operating a School Receiving Title I Assistance

Coverage before: No, unless the church itself also received the assistance. Churches, like other institutions and entities have always been subject to the nondiscrimination laws if they receive federal financial assistance. The only exemption has been for those situations in which application of Title IX would be inconsistent with religious tenets (20 U.S.C. 1681 (a)(3)).

Coverage after: No, except when the church also receives the assistance.

k. University-owned Commercial or Residential Building

Coverage before: The inclusion of the commercial activities of universities in the Title IX prohibition on discrimination is not the result of anything in the Civil Rights Restoration Act. the broad scope of the law, reflected in regulations which encompass even non-educational activities, give strong indication that university-owned commercial or residential buildings be covered. Such a building would also be covered under Title VI, Section 504 and the Age Discrimination Act. These laws make no distinction between educational and non-educational activities.

Coverage after: The legislation simply restores the coverage situation that existed before the Grove City decision.

l. National Political Parties

Coverage before: No

The national political parties have nondiscrimination obligations under the Voting Rights Act; however, no additional civil rights obligations arise from the receipt of federal Presidential campaign funds. The regulations are silent on this point, but a 1980 federal court decision sets out what we view as the appropriate analysis to explain why federal presidential campaign funds do not trigger coverage under the laws amended by the Civil Rights Restoration Act. The judge found that Section 504 did not apply to the two presidential campaign headquarters because the legislative history of the law authorizing the funds made clear that the money was intended for the sole purpose of benefitting the campaign activities of the candidates. Each candidate is therefore the "ultimate beneficiary" of the funds and the exemption from recipient status should apply. (See Paralyzed Veterans of America v. Civiletti)

Coverage after: No

m. Professional Baseball Team Performing in Municipal Facilities

Coverage before: No

No coverage of a professional or other sports team would come about simply because it played in a municipally-owned facility, even if the city was a recipient of federal financial assistance. The concept of indirect assistance, which has always been in the regulations, has never been interpreted to apply to such situations. (See Title VI definition of recipient, for example.) For assistance to extend indirectly there must be something more than the lease of a municipal facility.

Coverage after: Nothing in the legislation would make any entity a recipient which was not a recipient before.

n. Insurance companies administering Medicare or Medicaid Programs

Coverage before: According to the Department of Health and Human Services, insurance companies which administer Medicare and Medicaid contracts do so as contractors performing administrative services for the agency. They have never been considered "recipients" on the basis of these contracts. The companies do not receive the federal money extended to Medicare or Medicaid beneficiaries; they receive payment for HHS for the services they perform as would any other contractor. (See "Report on the Major Programs Within the Jurisdiction of the Subcommittee on Health and the Environment.": Committee on Energy and Commerce. Committee Print 98-C, April 1983, p. 5)

Coverage after: No

The legislation would do nothing to change the status of the present arrangements described above.

Senator MIKULSKI. Ms. Mayerson?

Ms. MAYERSON. Madame Chair and Senator Weicker, my name is Arlene Mayerson, and I am the Directing Attorney of the Disability Rights Education and Defense Fund.

DREDF is a national disability civil rights organization dedicated to securing equal opportunity for more than 36 million disabled adults and children.

While I am honored to appear before you today, I also feel a great sense of sadness that this is my third appearance since 1984 when the restrictive Grove City College case was decided by the Supreme Court.

In my previous testimony, I extensively set forth the legislative history and administrative interpretations of Section 504 prior to Grove City. I believe that this history clearly demonstrates Congress' original intent and past administrative practices that Section 504 be interpreted broadly to prohibit the use of Federal funds by discriminating recipients.

Today I would like to try to impress upon you the very real need for S. 557, also in response to Mr. Disler.

As an advocate within the disability community, I hear thousands of stories from both clients and friends about the constant subjection to ignorance and stereotype faced by disabled people. People with cerebral palsy are assumed to be retarded. People in wheelchairs are considered fire hazards. Deaf people are assumed to be dumb. And all disabled people are presumed to be helpless and dependent.

My most recent favorite story involves the Director of Disability Rights Education and Defense Fund, Mary Lou Breslin. Mary Lou is a post-polio quadriplegic. She went to New York on a fundraising trip, and she had some time to kill, so she went to Grand Central Station, where she was sitting, watching the people go by and drinking a cup of coffee. As she sat there, sipping her coffee, a woman ran past and put a quarter in her full cup of coffee. This woman saw a disabled person and automatically assumed that she was begging.

I know that these assumptions are false, and I trust that the members of the Committee also know that they are false. But unfortunately, these stereotypes are deeply rooted in our history and in our culture. And of course, those in positions to hire employees, admit students, rent to tenants and treat patients and make other important decisions for recipients of Federal financial assistance are members of that same general public and often share the same unfounded beliefs and negative attitudes.

Section 504 does not ban discrimination from our society. It does not stop the daily humiliations faced by Mary Lou and millions of other people. It does prohibit those entities receiving Federal financial assistance from relying on ignorance and stereotype to unfairly exclude and segregate disabled people.

Section 504 extended a promise to disabled people that cannot be fulfilled unless this Congress overturns Grove City, including its application outside the area of education.

It is quite astounding to me that there are still those who claim that the negative effects of Grove City will be cured by narrow legislation which addresses only Title IX or only education.

The same day the court handed down Grove City, it issued *Consolidated Rail Corporation v. Darrone*. Darrone was an employment discrimination case by a railroad. It had nothing to do with education. The court explicitly held that its narrow interpretation of "program or activity" in Grove City applied with full force to Section 504.

Grove City's ruling has been applied across-the-board in Section 504 cases to corporations, elementary and public school systems, higher education, health care, transportation and city and State departments.

Mr. Disler said that if a need can be shown to overrule Grove City beyond education institutions, then the Administration would consider doing so. This need is clearly demonstrated by the across-the-board, narrow, unfair application of Grove City to all areas of Section 504.

What does Mr. Disler have to say to Mr. Foss who testified earlier that he was terminated from his job of 18 years with the fire department, but does not even get a day in court because the fire department, although they received Federal funds, did not receive funds for his salary or his job?

Could this really be what Congress intended when it passed Section 504? I think the answer is clear that it was not what Congress intended.

The law is now piecemeal, ineffective and hypocritical. What do we say to the disabled teacher in Lauderdale County School District who OCR found was terminated from her position because of handicap discrimination when the administrative law judge dismisses her case because he held that although the school district received impact aid, they did not receive money to fund her particular salary.

And what do we say to the disabled student at Rose Hills Community College, who has no access to housing offered by the college because his complaint is dismissed because the Federal financial assistance to the college is not specifically for housing?

And how do we explain to the disabled maintenance worker at the University of Charleston that he cannot pursue a 504 claim for handicap discrimination because the school gets no money for maintenance, even though they have received over $2.5 million of Federal financial assistance?

The list goes on and on, and these are all real cases. There can be no doubt that Grove City's impact extends to all aspects of Section 504. S. 557 addresses the full impact of the Grove City decision by restoring all of the four civil rights statutes.

In 1972 when 504 was introduced, Senator Williams said:

> I wish it to be said of America in the 1970s that when its attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law. The handicapped are one part of our Nation that has been denied these fundamental rights for too long. It is time for Congress and the Nation to assure that these rights are no longer denied.

Let us not let the 1980s signify Congress' retreat from this commitment.

We strongly urge the passage of S. 557.

Senator MIKULSKI. Thank you very much for that testimony.

[The prepared statement of Ms. Mayerson follows:]

WRITTEN TESTIMONY
SUBMITTED BY THE
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

On S. 557 "Civil Rights Restoration Act of 1987

Senate Committee on Labor
and Human Resources

Arlene Mayerson
Disability Rights Education and Defense Fund, Inc.
1616 P Street, N.W.
Washington, D.C. 20036

Mr. Chairman and Members of the Subcommittee, my name is Arlene Mayerson and I am the Directing Attorney of the Disability Rights Education and Defense Fund (DREDF). DREDF is a national organization dedicated to securing equal opportunity to 36 million disabled Americans.

I appeared before Congress in 1984 and 1985 to express the importance of overruling the Grove City College decision and restoring the basic civil rights of minorities, women, disabled people and the elderly. I am attaching copies of my previous testimony which fully sets forth the legislative history of Section 504 and the administrative interpretations which were endorsed by Congress. This history clearly demonstrates Congress' original intent that Section 504 broadly prohibits discrimination by recipients of federal funds.

Today I would like to supplement previous testimony to highlight the devastating effect that the Supreme Court's decision in Grove City has had and will continue to have in assuring equal opportunity to disabled Americans. The promise of Section 504 cannot be fulfilled until Grove City College is overturned by Congress.

First, let me emphasize that there is no doubt that Grove City is applicable in full force to Section 504 and that it extends beyond education. It is quite astounding to me that there are those who still claim that the negative effects of Grove City will be cured by narrow legislation which addresses only Title 9 or only education programs. The same day that the Court handed down Grove City, it issued Consolidated Rail Corporation v. Darrone, 104 S. Ct. 12248 (1984). Darrone was a Section 504 case involving employment discrimination by a railroad. The Court explicitly held that its narrow interpretation of "program and activity" in Grove City applied with full force to Section 504.

THE IMPACT OF GROVE CITY ON ADMINISTRATIVE ENFORCEMENT OF SECTION 504 AND OTHER CIVIL RIGHTS LAWS

The Office for Civil Rights in the Department of Education (OCR/ED) and its counterpart in the Department of Health and Human Services (OCR/HHS) are two of the agencies primarily responsible for enforcement of the civil rights laws narrowed by Grove City, and therefore examples of the effect of the Supreme Court's decision from these agencies are illustrative of the general crisis Grove City has caused. Each of these agencies executes its administrative enforcement duty through the investigation of citizens' complaints, periodic compliance reviews, corrective action agreements (where a violation has been found), and monitoring of these agreements. If voluntary compliance is not achieved, the agency may refer cases to an Administrative Law Judge (ALJ) for a hearing. This hearing is the first step in the process which can lead to termination of federal financial assistance if discrimination is proven. The decision of the ALJ can be reviewed by the Civil Rights Reviewing Authority of each agency. Agencies also have the option of referring matters to the Department of Justice for a possible lawsuit.

The negative impact of Grove City can be seen in the OCR's of both of these agencies at every level of the enforcement process described above. In fact, the Department of Education has embraced the Court ruling with such vigor that a lawsuit has been filed against them alleging incorrect, inconsistent, and overly restrictive interpretations of Grove City. For example, dozens of cases have been closed by these agencies based on Grove City. Over twenty of these cases were Section 504 cases and most of these involved allegations of employment discrimination. In fact, the impact of Grove City on disabled persons' protection against employment discrimination is particularly severe. Section 504 is the only federal law prohibiting employment discrimination against otherwise qualified disabled persons. Since the Supreme Court decision, this protection has evaporated. Closure of Title IX cases has been even more severe than closure of Section 504 cases, and all of these statistics are merely fractional representations of the number of cases that have been closed in all of the federal agencies and will be closed in the future due to Grove City.

A crucial yet overlooked problem is the fact that many more cases have been delayed or suspended due to Grove City. Following the Supreme Court's decision, OCR/ED and OCR/HHS suspended a tremendous number of investigations and cases in order to review agency jurisdiction in light of Grove City. Many of these suspensions affected cases that had already been within the OCR process for years. This burdensome review has been made more complex and lengthy due to the fact that many regional OCR offices have sent the more difficult cases to their national offices for a determination of the Grove City jurisdictional issue. Defendants and potential defendants in these cases have taken full advantage of the situation and many consistently and adamantly raise Grove City as an absolute defense to the allegation in question and they even use the decision to protest further investigation by OCR. These tactics and resulting requests to OCR's to "justify" their jurisdiction in light of Grove City have compounded delays in investigation and enforcement proceedings with the result that justice delayed has truly become justice denied.

OCR/HHS cases involving hospitals are a good example of the very problem. In more than ten cases, hospitals have raised the Grove City decision as a defense. All of these cases involve allegations of employment discrimination brought by disabled employees. Much like schools, hospitals argue that the section of the hospital in which the complainant worked (e.g., the medical records center or the laundry) receives no federal funds and thus is not covered by Section 504. Though investigations have proceeded in many of these cases, hospitals have caused serious delays and also continue to preserve the option of pressing the jurisdictional issue should they be found in violation of Section 504.

Delays and losses of otherwise compelling cases have also begun to take place at the administrative hearing level. By April 1985, for example, 12 cases in which the Grove City decision was used as a jurisdictional defense had been referred by OCR/ED to administrative law judges. In all of these cases, four of which were Section 504 cases, the OCR established a violation of law and was unable to obtain voluntary compliance. There have been decisions in at least two of these cases. In one case involving a joint Section 504 and Title IX complaint, OCR initially found that the school board failed to renew the contract of a disabled teacher because of her disability, and used an employment application which improperly inquired into the applicant's health, physical "defects" and marital status. The Distict received federal funds in the form of Impact Aid, which OCR found sufficient to make the school's employment decision subject to the Civil Rights laws. Nonetheless, the judge interpreted Grove City to require the opposite conclusion. He stated that OCR did not have jurisdiction to bring or maintain the action because the teacher was not employed in a "program or activity receiving federal funds." (See, In The Matter of Lauderdale County School District, Docket No. 84-504/IX-8, April 23, 1985.)

In another case, OCR/ED conducted a compliance review of a public school system determined that the tracking system used by the County was discriminatory and moved for an order to terminate funding, after being unable to obtain voluntary compliance from the school board. The administrative law judge denied the order, but not because he had examined and disagreed with the Department's conclusions as to discrimination. Rather, he interpreted Grove City to require proof that the federal funds were spent specifically on the tracking system, and not simply to support the school system generally. (See In The Matter of Mecklenberg County Public Schools, No. 84-VI-2, Slip Op. June 2, 1985) (Title VI).

At every level, this alarming situation is repeating itself. Even those cases in which OCR asserted jurisdiction despite Grove City and won at the administrative hearing level seem to be in danger at the Civil Rights Reviewing Authority level. In The Matter of Pickens County School District, Docket No. 84-IX-11, October 25, 1985, is the first interpretation of Grove City by a Reviewing Authority. In Pickens County, the Reviewing Authority held that "if the physical education classes are receiving federal financial assistance, the department would have authority to terminate [Chapter 2] funds." However, the

Reviewing Authority found that the OCR did not meet its burden of establishing the fact that the physical education classes are a program or part of a program receiving federal financial assistance. The Reviewing Authority rejected OCR's contention that Chapter 2 funds are unearmarked aid, holding that "consolidation did not destroy the separate identity of these programs. Each of the programs earmarks funds for a particular program." The Reviewing Authority (ED) dismissed the enforcement proceeding against Pickens County. The disastrous impact of this decision has been compounded by the fact that OCR/ED's Assistant Secretary Singleton has decided to follow Pickens and use it as a guide for national OCR/ED policy. (Four other Section 504 cases are currently pending before the Reviewing Authority of the Department of Education.)

This description of the present situation with regard to the impact of Grove City on administrative enforcement is merely a static overview. The effects of Grove City up to this point are only a small sample of the larger problems that are looming. As time passes, more complaints will be limited, closed or never filed due to the Grove City decision and its chilling effect. For example, the effect on OCR-initiated compliance reviews is only beginning to be felt as OCR/ED and other OCR's narrow their investigations to "programs or activities" in whose budgets OCR can identify federal dollars and thus be certain of their jurisdiction. Ultimately, this type of policy decision is as damaging as the many cases closed and lost due to Grove City.

DESCRIPTIONS OF DEPARTMENT OF EDUCATION/OCR COMPLAINTS CLOSED DUE TO GROVE CITY

The many injustices caused by the Grove City decision and its enforcement by agencies and the courts cannot be adequately conveyed by simply quoting the number of complaints closed, delayed, denied or never investigated, due to this decision. Though it would be impossible to describe the facts in all of the cases negatively affected by Grove City in a brief article, it is worthwhile to provide summaries of some of the 504 cases closed by one agency, the Department of Education. Whether the case in question was closed because the specific unit in question was not in receipt of federal funds or because OCR found it impossible to satisfy Grove City's standard with regard to tracking federal monies to the alleged discrimination in question, the results are uniformly unjust. The specific facts of these cases speak louder than general descriptions can about the unfair nature and devasting impact of the Grove City decision on disabled Americans.

Docket No. Respondent

01-84-4006 Massachusetts Department of Youth Services

Mr. X claimed he was discriminated against by the Massachusetts Department of Youth Services on the basis of his handicap status. Mr. X alleged that although he passed the exam for "supervising group worker" and was ranked first on the list for such a position, he was not given a supervisory position with reasonable accommodation for his disability. In a May 9, 1984 letter to the complainant, OCR/ED stated that the complaint did "not appear to involve an ED funded program or activity." Though the Department of Youth Services receives federal funds through the Chapter I program, these programs are supervised by private vendors or the Mass. Bureau of Institutional schools. As a result, the Department of Youth Services' custodial program where complainant applied for the position was deemed not to be in receipt of federal funds.

03-84-2040 University of Charleston

Mr. X, a maintenance worker at the University of Charleston in West Virginia, filed a complaint with OCR/ED alleging employment discrimination based on disability. The University's lawyers told OCR that it received no federal funds for maintenance and therefore OCR had no authority to investigate. Since 1979 the University of Charleston has received approximately $3,376,182 in federal funds from the Department of Education, including $472,940 in federal student aid in the 1983-84 school year. OCR put this complaint on "policy hold" because it could not link the allegation of discrimination to a specific, federally funded program.

04-77-0042 DeKalb Community College

In 1977, Mr. X filed a complaint against DeKalb Community College with ED and the Office of Federal Contract Compliance Program (OFFCP) alleging that the institution failed to renew his teaching contract for the 1977-78 academic year because of his epileptic seizures, in violation of Section 504. Since the initial complaint was filed with OFFCP, ED deferred its investigation to them. In May of 1983, OFFCP found that while the complaint was valid, they lacked jurisdiction. In May 1984, OCR/ED informed the complainant that because of Grove City, OCR/ED also lacked jurisdiction. OCR/ED established that the school received federal money through ED in the form of student financial aid, but they could not determine that the monies were used in the department where Mr. X was employed.

07-82-1017 Central Midwestern Regional Educational Laboratory, Inc. (CEMREL)

Parents X and Y filed a complaint against CEMREL alleging that the Child Center of Our Lady of Grace (CC) discriminated against their disabled child by failing to provide her and other disabled children a free appropriate public education, and also by retaliating against the child after the complaint was brought. Though OCR/ED found that CC did receive federal monies in the form of Title VI-B grants, they informed the parents that the Grove City decision rendered those funds irrelevant in terms of triggering 504 coverage for CC in general.

07-85-4015 Menninger Foundation

Ms. X filed a complaint with OCR/ED in 1985 alleging discrimination on the basis of handicap against the Menninger Foundation, Topeka, Kansas. Specifically, she stated that she enrolled in a Biofeedback Workshop offered by the Voluntary Controls Program at the Menninger Foundation, but the facilities were not accessible to mobility-impaired individuals. OCR/ED found that while the Foundation received federal monies from ED, it concluded, pursuant to Grove City, that neither the Voluntary Controls Program nor the Biofeedback Workshop was part of the funded program. OCR/ED closed this case.

09-83-4003 Arizona Department of Corrections

Mr. X filed a complaint against the Arizona Correctional Training Center alleging he was fired from his job on the basis of his handicap. ED found that the Department of Corrections, which operates the Correctional Training Center, received federal financial assistance from ED through the Arizona Department of Education. The Department of Corrections not only received approximately $500,000 a year under Title VI, Part B of the Education of the Handicapped Act, but also received federal vocational education funds during the period of the complaint. Despite these findings, OCR/ED held that there was no jurisdiction since the complainant was not employed in, nor had any substantial contact with, any of the specific educational programs which received the federal funds. ED referred the case to the Department of Justice which closed it for lack of jurisdiction.

09-84-4013 County of Plumas, Local Agency Formation Commission and Plumas County Planning Department (LAFC & PCPD)

In March 1984 Ms. X filed a complaint against LAFC & PCPD, alleging discrimination on the basis of handicap and sex in her termination as a Commission clerk in 1983. She reapplied for the position when announced, but was not selected. OCR/ED's March 1984 letter to Ms. X stated that although ED monies went through the Office of the Plumas County Superintendent of Schools, no monies went to her particular office, hence no jurisdiction existed.

15-85-4002 Michigan Department of Corrections

Mr. X alleged that the Department of Corrections denied him employment as a parole/probation agent because of the fact that he was blind. OCR/ED closed the case without ever investigating it. OCR/ED found that while the Department of Corrections received ED monies, the Bureau of Field Services, which employs parole/probation officers, did not receive ED monies directly.

THE COURTS AND SECTION 504 AFTER GROVE CITY

Though the balance of the damage caused by the Grove City decision has taken place in the area of administrative enforcement of Section 504, or lack thereof, the courts have also begun to incorporate Grove City's restrictive interpretation of "program or activity receiving federal financial assistance into Section 504 cases as well as Title IX, Title VI and Age Discrimination Act cases.

In Jacobson v. Delta Airlines, Inc., 742 F. 2d 1202 (9th Cir. 1984), the court held that the airline did receive federal financial assistance in the form of subsidies for small community service, but the receipt of such payments only subjected the small community service program--not the entire airline--to the civil rights laws. Since the alleged discrimination against plaintiff did not take place in connection with this program, Section 504 was found to be inapplicable and the case was dismissed. As a result, Delta's practice of requiring disabled persons to sign "medical release forms" acknowledging that they may be removed from a flight at any point for unspecified reasons, was allowed to stand. This result occurred despite the fact that the court found Delta's practice to be otherwise unreasonable under substantive Section 504 law, and despite the fact that Delta received considerable and varied types of federal financial assistance.

Price v. Johns Hopkins University, et al., Bench Opinion, Civil Number HM83-4286 (D.C. Maryland 1985), involved a blind philosophy professor who was denied access to an adequate number of college work study readers by the University and was forced to pay for necessary extra readers from his own funds. Price asserted that the relevant "program or activity" for Section 504 purposes was the entire university. Citing Grove City and

Jacobson, the court ruled that a program-specific approach was in order, and thus the case must be limited to the work study program only.

Gallagher v. Pontiac School District, No. 85-1134, (6th Cir.), Slip Opinion, December 16, 1986

A handicapped student's case was dismissed because the court held that there was no federal assistance to a specific program, even though the student participated in special education which received federal funds.

Russel v. Salve Regina College, C.A. No. 85-06 28-S U.S. Dist. Ct. of R.I., Slip Opinion, November 17, 1986

The court held that there was no cause of action under Section 504 in a case alleging discrimination in a nursing program where the only money received by the college is through financial aid to students.

Foss v. City of Chicago, 640 F. Supp. 1088, (N.D. Ill. 1986)

The court held that a handicapped firefighter could not sue the Chicago Fire Department under Section 504 because he was not employed in a specific program receiving federal financial assistance. Although revenue sharing funds could have been distributed to the fire department because they were not earmarked, the court held that the fact that they were not so distributed avoids Section 504 coverage. The specific grants to the fire department concerned programs unrelated to plaintiff's employment.

Chaplin v. Consolidated Edison Company, 628 F. Supp. 143 (S.D.N.Y. 1986)

Receipt of CETA and WIN training grants did not suffice to invoke coverage of the entire company. The court held that coverage is limited to persons participating in the training programs.

Greater Los Angles Council of Deafness v. Zolin, County of Los Angeles, No. CV 81-6338-ER, Slip Opinion, (C.D. CA July 2, 1984)

Refusal to seat deaf jurors may not be challenged under Section 504 where superior court has been in the past but is not in the present receiving federal financial assistance. Unearmarked revenue sharing funds were held not to be sufficient to invoke coverage, if not specifically dispersed to the superior court.

Bradford v. Iron County C-4 School District, C. No. 82-303-C(4), Slip Opinion, (E.D. MO June 13, 1984)

The court held that unrestricted federal funds trigger coverage, but also held that the defendant has the opportunity to prove that the program or activity at issue did not utilize the unrestricted federal funds.

CONCLUSION

There can be no doubt that Grove City is serving to defeat the original intent of Congress in passing the nation's civil rights laws. As President Kennedy stated when he transmitted the first of these statutes to the Congress:

> Simple justice requires that public funds to which all taxpayers of all races contributed not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.

This same commitment of "simple justice" was extended to disabled Americans in 1973. Once again disabled Americans turn to Congress to reaffirm the basic principles of equal opportunity through passage of S. 557, which is nothing more than a clarification of Congress' long-standing intent that recipients of federal funds are prohibited from engaging in discriminatory practices.

We urge you not to turn your backs on 36 million disabled Americans, who are only now beginning to have the opportunity to participate in our society free of discrimination.

Thank you for your consideration.

Senator **Mikulski**. I am sure, like you, I was thrilled to watch the Academy Awards the other night to watch someone who maybe could not have gotten into college, gotten her housing, gotten her health care, win an Academy Award. And certainly, if hearing-impaired people and others in like circumstances receive Academy Awards, we could certainly afford them the protection of the law of the Federal Government.

But it was very moving to me to see her accept the award and the cultural paradigm that it cracked—not only that a hearing-impaired person could win an Academy Award in a profession whose skill is based solely on communication and win that, but when she accepted the award, that for once we looked at her, and the interpreter was the voice person. It was really, I think, an absolutely stunning picture. I think she will be remembered as much for the impact she had in accepting her award on the American psyche as for her own stunning dramatic presentation. And I think you share that.

Ms. **Mayerson**. Yes.

Senator **Mikulski**. I found that a two-kleenex event, watching that.

Mr. Garvey?

Mr. **Garvey**. Thank you, Senator.

Since I am the last speaker, I am sure I will get a more attentive audience if I just ask that my prepared statement be introduced into the record.

Senator **Mikulski**. Well, you have certainly gotten my attention with that comment.

Without objection, so ordered, and if you would care to summarize, we are happy to hear your comments.

Mr. **Garvey**. I would like to do two other things. One is, I have written an article for the Harvard Journal on Legislation about the subject of these hearings, which I have referred to in my prepared statement, and which I would like also to be entered in the record.

Senator **Mikulski**. I would like the Committee staff to review it in terms of size and content.

Mr. **Garvey**. It is very brief, Senator. You will not have any difficulty reproducing it.

Senator **Mikulski**. Nobody has ever come here, Mr. Garvey, and said, "I am going to be long" and so on. But we will accept your statement.

Mr. **Garvey**. Thank you.

I would just like to take a few minutes to respond to a couple of questions that you have had in the course of the last half-hour or so.

You said to Bishop Sullivan's counsel that there really need not be any concern about the effect of this bill, because it was nothing new. You asked Mr. Conway what exactly was the scope of the pre-*Grove City* coverage, and why this bill is different. Those are the questions that I would like to respond to.

There are two things that are different about this bill from the pre-*Grove City* coverage. One of them is the language in the bill. There are a number of new terms which the preceding speakers have referred to: the language about "all of the operations of", the phrase "combination", the phrase "as a whole", the phrase "other school system", the coverage of "entire plants", and the language that refers to corporations or associations providing parks and recreation, social services, education, health care, and so on. Those are new terms.

What they try to do is also different from what was done before *Grove City,* and that is the second comment that I want to make.

Senator Weicker and Senator Hatch said this morning that really, what everybody is concerned about is preventing discrimination in the use of federal financial assistance. We do not want federal money to be used to support discrimination. Ms. Jones agreed with that, and Senator Hatch agreed with Senator Weicker about that. So I think we should take that as the starting point. That is what the phrase "program or activity" is intended to do in Title VI and Title IX, in Section 504, in the Age Discrimination Act. Those acts are tied to receipt of federal financial assistance. They impose obligations on people who get federal money because we do not want people who get Federal money to be using federal money to discriminate.

Now, there are a couple of ways in which they might do that. One way in which Congress discriminated with federal money at the time it passed Title VI was by distributing it in an intentionally discriminatory way; it acted unconstitutionally, in laws like the Hill-Burton Act, the Second Morrill Act, and the impact aid statute. Those laws specifically provided that people who got federal money could use it for separate but equal facilities. That is not just improper; that is unconstitutional action by Congress.

But another way in which Congress can support discrimination—and one which these laws currently, before and after *Grove City,* forbid—is by allowing recipients to use federal money to discriminate. If that is what we are worried about, then the phrase "program or activity" ought to mean the federal program or activity that is handing out the money. It should mean the school lunch program, or the farm-to-market road program. You will in fact find language in the statutes as they are currently written which is intended to carry that meaning. They say that if an agency terminates federal funds, then the agency has got to give notice to the House and Senate committees having "jurisdiction over the program or activity involved." You will also find such language in the regulations. The Title VI regulations begin by saying, "here is a list of covered programs and activities," and then they list a bunch of federal programs at the end.

That is a narrower meaning than we currently give to "program or activity". In fact, the case which expanded the meaning of "program or activity" beyond that narrow sense was *Grove City.* Grove City College argued that "program or activity" meant Pell Grants—that was the federal program at the College. But the Justice Department urged, and the Supreme Court concluded, that some of the recipient's own money ought to be included, not just Pell Grants. And there are good reasons for including some of the recipient's own money. One is that you cannot always be sure where the federal money goes. When the federal government gives money to build a hospital in conjunction with a university, you cannot say that the federal money built the first two floors, and the university's money built the second two floors. So the regulations say that the whole hospital is covered. They do not say that the stadium is covered. The reason they do not is that federal accounting rules that the Department of Education and HHS have enable you to determine that the money was in fact used on the hospital and was not used on the stadium.

This bill goes beyond the pre-*Grove City* law by unhinging the nondiscrimination conditions that are being imposed from the federal financial assistance that is being offered. By covering cases that are beyond the "program or activity" limitation, what they do is to impose obligations that have nothing to do with the federal money that is being offered.

Let me just give one example, and I can give more if you like. The bill says in Section (i)(A) that the phrase "program or activity" means "all of the operations of a department * * * of * * * State * * * government. In Kentucky that means that if the Adult Services Office in Ashland, Kentucky gets federal money, then the Foster Care Office in Paducah, Kentucky (at the other end of the State) has to comply with Title VI, with Section 504, with the Age Discrimination Act, even though the federal money can have nothing to do with the operations of the office in Paducah.

I will conclude by saying why this worries me. What I find worrisome about this is that it means there is literally nothing—short of violating explicit constitutional prohibitions—that the federal government cannot do by using its spending power. If the federal government wanted the State of Kentucky to teach biology in ninth grade rather than tenth grade, it could say to the state education agency: "You get lunch money, so this is your curriculum." Or if it wanted the State Attorney General in Kentucky to concentrate his prosecution efforts on drug enforcement or on organized crime, the government could say: "You get money to buy state police cars, so this is how we want you to run your prosecution efforts."

If the federal government wanted a uniform marriage and divorce law in Kentucky, it could say: "If you want general revenue-sharing funds, you have got to pass this law."

That is what concerns me about unhinging the conditions from the federal money.

I think it is appropriate to remember, in this 200th year of its birth, that there are a number of principles embodied in our Constitution, and one of the principles that we sometimes overlook is that there are limits on what the federal government can do. The Tenth Amendment does not impose independent obligations, but it does talk about "the powers not delegated to the United States by the Constitution." There are no such powers if you can unhook conditions from the federal assistance in the way S. 557 does.

Thank you.

Senator **Mikulski**. Thank you, Mr. Garvey, for your erudite presentation.

[The prepared statement of Mr. Garvey follows:]

PREPARED STATEMENT OF JOHN H. GARVEY

Thank you very much for inviting me to appear before you this morning. My name is John Garvey. I am the Wendell Cherry Professor of Law at the University of Kentucky. I have taught courses in civil rights law for ten years at Kentucky and the University of Michigan, and have written about the subject of these hearings for various academic journals.[1] From 1981 through 1984 I was an Assistant to the Solicitor General. During that time I worked on Grove City College v. Bell and other matters concerning Title VI, Title IX, and Section 504. The views I express, however, are my own.

S. 557, like its predecessors in the last Congress, would make bad law out of bad history. It is entitled the "Civil Rights Restoration Act of 1987," a title that suggests it's nothing new. It finds that the Supreme Court, heedless of "prior consistent and long-standing" interpretation, has "unduly narrowed" the anti-discrimination rules for federal grantees. That's the bad history. S. 557 would right this imagined wrong by requiring grantees to reform all of their operations to federal specifications. That's the bad law.

Because my difficulties with the bill are so fundamental I would like to make just one big point about it rather than spend my time on its details. The big point I want to make is that the bill embodies a major shift in

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[1] Garvey, The "Program or Activity" Rule in Antidiscrimination Law: A Comment on S. 272, H.R. 700, and S. 431, 23 Harv. J. Legis. 445 (1986); Garvey, Another Way of Looking at School Aid, 1985 Sup. Ct. Rev. 61.

Congress's use of the spending power. I view this change as a serious mistake in part because of its implications for other areas of the law, but also in part because it could subvert rather than enhance civil rights enforcement.

The change that I find in S. 557's use of the spending power is this. Historically the conditions Congress has attached to federal funds have had something to do with the use those funds are put to. Non-discrimination rules are a good example: they assure that the government does not facilitate discrimination when it hands out money. But there has always been some causal link between spending and forbidden act that justifies the statutory condition. The 'program or activity' rule is such a link. S. 557 severs that connection by essentially abandoning the 'program or activity' rule. It lets the government behave like a rich uncle who threatens to disinherit his niece unless she quits smoking. As I will explain below, that is not how Uncle Sam should act.

1. Spending And Causation

Let me first look at this change from an historical perspective. Doing so will illustrate the difficulties I have with the view of history embodied in S. 557.

When it enacted Title VI, Title IX, Section 504, and the Age Discrimination Act Congress was concerned about causing discrimination with federal money. This could happen in various ways. In 1964, when Title VI was enacted, the federal government itself was intentionally using federal funds to discriminate. The Hill-Burton Act was one example: it specifically provided that states could use the money to provide separate but equal hospital facilities.[2] The Second Morrill Act was another: it let states establish separate land grant colleges "for [w]hite and colored students."[3] We tend to forget the kind of world the 88th Congress lived in. A large part of its problems had to do with its own behavior, not that of recipients.

Of course federal dollars can be spent on discrimination even if Congress does not expressly say so. Here it's the doing of recipients, but the government should be held responsible for enabling them to misbehave. Senator Pastore, who managed Title VI in the Senate, was worried about this:[4]

> Title VI is necessary, first of all, because the Federal Government simply cannot be expected to continue to pay out tax dollars contributed by all the people to just some of them and to exclude others because of the color of their skin.

Representative May said the same thing about Title IX:[5]

> Which students receive this [federal] scholarship money is decided upon by the individual colleges and universities--where there are often quota restrictions on women[.] Thus, we find ourselves faced with a situation wherein federal funds are subsidizing discriminatory opportunities--and there is no way to get it back!

Congress was thus worried, in the second place, about what federal dollars were spent for. Now if that is the concern, 'program or activity' ought to mean the federal grant program. Title VI and Title IX actually say this in several places. They say, for example, that when funds are terminated the terminating agency must file a report "with the committees of the House and Senate having legislative jurisdiction over the program or activity involved[.]"[6] And that's the way many people understood the phrase until the 1970's.[7]

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[2] 42 U.S.C. § 291e(f) (1958) (repealed 1964).

[3] 7 U.S.C. § 323 (1958).

[4] 110 Cong. Rec. 7061-7062 (1964).

[5] Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, 91st Cong., 2d Sess., pt. 1, at 235 (1970).

The Supreme Court, at the government's urging, rejected this interpretation in Grove City. The College argued that if tuition grants counted as assistance to the school, the relevant program or activity was the Pell Grant program. The Court held that some of the school's own money was also covered.[8]

There are several reasons for including some of the recipient's own money in the 'program or activity.' One is that it might be hard to trace the federal funds. If the government shares the cost of building a hospital with a university we can't be sure where the federal dollars go, so HHS regulations say the whole building is covered.[9] Federal accounting procedures assure that the money is spent on the hospital, so the regulations do not say the whole university is covered.[10]

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[6] 42 U.S.C. § 2000d-1 (1982) (Title VI); 20 U.S.C. § 1682 (1982) (Title IX).

[7] See, e.g., Board of Public Instruction v. Finch, 414 F.2d 1068, 1077 (5th Cir. 1969).

[8] 465 U.S. 555, 571 n.21 (1984).

[9] 45 C.F.R. § 80.5(e) (1986) (HHS Title VI regulations); id. § 84.5(b)(1) (1984) (Section 504).

[10] Occasionally the regulations, while respecting this principle, make rules of evidence that shift the burden of

(Footnote Continued)

Some people have argued that another reason for including the recipient's own money in the 'program or activity' is that federal dollars free up funds that a grantee can then use for discrimination. If this actually happens then the government has in a sense caused the discrimination to occur--it's a domino theory. This theory has a lot of problems with it. One is that it is often illegal for a recipient to reduce its own contribution to the funded program. That is true, for example, of many grants for education.[11]

Another problem is that we don't subscribe to this theory outside the area of discrimination law. When Congress gives money to the University of Notre Dame for the study of physics, it doesn't assume that that will free up funds for teaching religion in the theology department. In fact if it did, grants to religious colleges would be unconstitutional. When Congress gives money to the University of Kentucky for the study of physics, it doesn't suppose that that will free up funds for performing abortions at the UK Medical Center. If we take that view of cause and effect Congress could refuse to give money to

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(Footnote Continued)
proof to the recipient. 45 C.F.R. § 80.5(c), for example, says that when a university gets a grant for one of its graduate schools, "discrimination in the admission and treatment of students in the graduate school is prohibited[.]" But it goes on to say that the prohibition will extend to the entire university unless the university satisfies HHS that its "other parts or programs" won't interfere with the grant.

[11] See, *e.g.*, 20 U.S.C. § 1094(a)(2) (1982) (institution receiving federal funds must agree not to diminish its own contributions to its scholarship and student aid programs); 20 U.S.C. §§ 1143(b)(3), 2736 (1982); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) (Secretary of Education may recover federal funds granted to a state if funds are used to supplant, rather than supplement, state expenditures).

hospitals that perform abortions. After all the government can't forbid abortions, but it has no obligation to fund them either.[12]

2. Free-Standing Conditions

Up until now, then, Congress has imposed nondiscrimination conditions as a way of preventing federal aid to discrimination. The point of the 'program or activity' rule is to define the area in which federal aid may be abused, and to forbid discrimination in that area. The theory behind S. 557 is different. The only justification for extending coverage to all of a recipient's other operations is to control discrimination for which the government can in no way be held responsible. As I suggested earlier, it's like my rich uncle saying, "I'll disinherit you if you don't quit smoking."

Let me make clear that that is exactly what the bill means. Section 2 covers "all of the operations of . . . a public system of higher education." So if UCLA gets a grant for its hospital, all the schools in the University of California system are covered by Title IX. Section 4 covers "all of the operations of a department . . . of . . . State . . . government." This means that if the adult services office in Ashland, Kentucky gets a federal grant, the foster care office in Paducah must comply with Section 504 because both are in the Department for Human Resources. Section 4 also covers "all of the operations of . . . an entire corporation . . . which is principally engaged in the business of providing . . . health care." So if RX Pharmaceuticals gets a research grant to study AIDS in

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[12] Harris v. McRae, 448 U.S. 297 (1980).

Atlanta, it must comply with Section 504 at its office in San Francisco.

There's nothing good about discrimination, so one is at a rhetorical disadvantage in objecting to conditions of this kind. But the most serious problem with this tactic has nothing to do with discrimination. The bill announces that there is literally nothing (save violating constitutional *prohibitions*) that the federal government cannot do. Under our Constitution the federal government has always been understood to be a government of enumerated powers. The powers that Congress has are listed in Article I, § 8. The Tenth Amendment, while it does not set any independent limit on what the government can do,[13] at least makes clear the Framers' conviction that there *are* some "powers not delegated to the United States."

This minimal assumption is not controversial. It is part of our way of thinking about the law. Just last year, in the course of invalidating HHS's 'Baby Doe' regulations, Justice Stevens pointed out that[14]

> State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade.[29]
>
> ---
>
> [29] Important principles of federalism are implicated by any "federal program that compels state agencies . . . to function as bureaucratic puppets of the Federal Government."

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[13] *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).

[14] *Bowen v. American Hospital Ass'n*, 106 S. Ct. 2101, 2120 (1986).

But S. 557 assumes that there need be no connection between the conditions attached and the funds granted. Let me give a few examples of what this could mean in the future. If a local grade school participates in the school lunch program, Congress could dictate to the state educational agency (which hands out the money) what math and science courses must be included in the high school curriculum. If the state police get money to buy new cars, Congress could order the state attorney general to focus his prosecution efforts on organized crime and drug offenses. If Congress thought it desirable to have uniform national marriage and divorce laws, it could condition a state's right to participate in general revenue sharing on its agreement to pass a model act.

The Supreme Court is considering a related problem this year in South Dakota v. Dole.[15] The Surface Transportation Assistance Act conditions highway funds on a state's willingness to raise its drinking age to 21. South Dakota claims that the Act violates the 10th and 21st Amendments. But in one way the Act is much easier to justify than S. 557. There is at least a link between federal highway funds and drunken driving by youngsters on those highways.

I do not mean to suggest that the Supreme Court would hold S. 557 unconstitutional because it's ultra vires. I do believe, as Professor Van Alstyne suggested after Garcia, that "the tenth amendment . . . may interpose a requirement of 'close fit' between conditions attached to federal funds and the demand made of recipient states[.]"[16] But the message of Garcia is that the responsibility of enforcing that requirement lies with Congress, not with the judiciary. That is not any the less a constitutional responsibility, though, just because the Court won't call you to task for ignoring it.

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[15] No. 86-260.

[16] Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1714 n.25 (1985).

3. Prudential Concerns

That is the most serious problem I have with S. 557. But there are also other, prudential rather than constitutional, reasons for thinking twice before passing this bill. One is that the government may get less, rather than more, of what it wants by abandoning the 'program or activity' rule. Consider the response of Grove City College itself. Its president stated during earlier hearings that it would refuse to admit students with Pell grants in order to avoid the costs of coverage.[17] That is a problem that will recur whenever the (now vastly increased) costs of compliance exceed the value to the recipient of getting the grant. You may see it with corner grocery stores and food stamps, with Exxon and job training grants, with Catholic school systems and remedial reading grants, with dozens of small companies that get research grants. In these cases the government, like Aesop's greedy dog, loses twice. By pursuing discrimination at every turn it frustrates the purposes of the grant program. It also loses the chance to combat discrimination at least in the area where the federal funds are spent.

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[17] Hearings on S. 2568 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 35 (1984) (statement of Charles S. MacKenzie).

As I am sure you are aware, the costs of compliance for those who do take grants are substantial. They include obligations to undertake self-evaluation, to take remedial action, to publicize to protected groups one's obligations under the law, to file compliance reports, to submit to periodic compliance reviews, to keep records, to entertain federal officials responding to complaints, to keep abreast of new regulations, and so on.[18] They also include the considerable expense of responding to private lawsuits, whether or not meritorious. The bill will vastly increase these, first, because so many more of a recipient's activities will be covered, and second, because every granting agency (even if there are a dozen) will now have jurisdiction over all of a recipient's operations.

I have said that total coverage may be unwise because many participants may simply opt out, and because the costs on those who remain in will be much higher. There is a third prudential consideration that affects the wisdom of this bill, and it has to do with a different development in the law under Title VI, Title IX, Section 504, and the ADA. The Supreme Court has indicated in several recent cases that the agencies enforcing these laws may promulgate regulations forbidding disparate effects on protected groups, even when the effects are unintended.[19]

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[18] See, e.g., 34 C.F.R. §§ 106.3, 106.9 (1986) (ED Title IX regulations); 45 C.F.R. §§ 80.6, 80.7 (1986) (HHS Title VI regulations).

[19] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. 287, 299 (1985) (the Court "assume[d] without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped").

This affects the wisdom of S. 557 in several ways. It means, first of all, that many members of the new class Congress wants to discipline are not evildoers. They are just people who have failed, unintentionally, to attack problems that are in no way connected with the federal grants they are receiving. We might all wish that they were more alert. But this new measure seems more extreme when you realize that it attacks not the morally infirm--as Congress did in 1964 and 1972--but the merely negligent.

Though it deals with forbidden conduct rather than coverage, the effects test will also multiply by still another factor the new costs imposed by this bill. Entire departments of government, school systems, corporations, and other associations will need to evaluate, report on, review, and defend in court a whole new range of activities.

I urge you to think long and carefully before enacting this bill. Thank you.

HARVARD JOURNAL
on
LEGISLATION

ARTICLE

THE "PROGRAM OR ACTIVITY" RULE IN ANTIDISCRIMINATION LAW: A COMMENT ON S. 272, H.R. 700, AND S. 431

John H. Garvey

Reprint

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Senator MIKULSKI. Ms. Jones, you cited several examples in the implementation of Title VI, one of which is those areas—there is a great deal of concern about where funds go to one institution, that it affects all other institutions. You cited the example of nursing homes, where you dealt with the chain.

Ms. JONES. Yes.

Senator MIKULSKI. And the private sector was actually pleased to hear that, because of the fact that they were located in several States, there were different rules, et cetera, and they were happy to have a national standard to comply with.

Ms. JONES. They wanted a compliance review of all of their nursing homes. They had several nursing homes in several states.

Senator MIKULSKI. In your enforcement, in both your study and therefore enforcement of civil rights, were there other examples where the private sector was pleased to have a national standard to comply with and therefore did it in several plants?

Ms. JONES. Senator Mikulski, there are examples—in Title VI that do not come to mind. Examples in Title VII clearly come to mind. I mean, there are examples in the civil rights laws.

Senator MIKULSKI. Well, what would be an example there, and then I will come back to the reverse side of the question.

Ms. JONES. Well, an example recently is the recent affirmative action decision of the Supreme Court of the United States in *Johnson*. Large segments of the business community wanted to know for some time what the rules are, what the bottom line is, what is it that we are permitted to do. We want to bring minorities and women into our work force, but at the same time we do not want to be subject to reverse discrimination suits.

They have been supportive over at the Department of Labor with the Executive Order 11246, as well as with the principles of voluntary affirmative action under Title VII and under the Constitution, because they know what the rules are. They do not want to be caught in a situation where if they go out and try to live up to public policies of inclusion, they are ridiculed and subject to damages for it in the court. So that is a clear example, and throughout the employment area, whether we are talking about contracts, several contracts to businesses, or whether we are talking about employment policies of businesses.

Senator MIKULSKI. We are not going to start an intra-panel debate. It is bad enough that we all squabble up here.

Ms. JONES. Okay, fine. I will not.

Senator MIKULSKI. But I am following the points made by all of the witnesses. So what you are saying is that your experience with the private sector is that they like a clear set of rules to the game, they like it nationwide, and that they like it systemwide.

Ms. JONES. Yes. I also find that many of them collectively, the businesses will understand the politics of exclusion that has been practiced historically with minorities. They understand that. But if there are laws that make it clear what their obligations are, then they will adhere.

Senator MIKULSKI. Now, let me ask the reverse of the question that I asked. In both your study and enforcement of law, the civil rights law, have you found corporations or affected entities that would discriminate, say, in one of their branches, but then not discriminate in the others? You see, my feeling is that if you discriminate in one plant and one factory, and you own four of them, you have a tendency to discriminate in all of them.

Ms. JONES. Senator Mikulski, there is an interesting flip side of that. When you cover—and that experience comes under Executive Order in doing the pre-award reviews—when you cover one segment of the business, and it only covers, let us say, employing individuals at a particular site, then there is a phenomenon that when you go for the review, all of the workers from the other sites who happen to be black or other minorities would be there that day. So you have limited your review to one site, but at the other ten sites on that particular day, there would have been no minorities. If you do not have the broad jurisdiction, you will not be able to see what the pattern is.

So I guess that is the flip side. And yes, usually if you find it in one place, you will find it in another.

Senator MIKULSKI. Which of course goes to your whole point about the enforcement of civil rights legislation. Very often, it is not only the single incident, often handled in an EEOC complaint, but the patterns of discrimination, the systematic expression of discrimination against anyone.

Ms. JONES. Exactly. That is why we have fought so hard against the Civil Rights Division of the Justice Department for the past six years, because they wanted to take a single individual to look at discrimination from the perspective of an aggrieved individual alone, and if there was a systemic problem identified, they did not want there to be an available remedy or review.

Senator MIKULSKI. Thank you. That answers my questions. I know that Senator Kennedy and the Ranking Minority would like to thank you for your participation in this hearing.

[Additional material supplied for the record follows:]

Statement of

Dr. Harry E. Fletcher

President

Washington Bible College, Capital Bible Seminary

In Behalf of the

American Association of Bible Colleges

Box 1523, Fayetteville, Arkansas 72701

Submitted to

THE COMMITTEE ON LABOR AND HUMAN RESOURCES

April 1, 1987

On the Subject of

ABORTION NEUTRAL LANGUAGE AND CIVIL RIGHTS

As President of Washington Bible College and Capital Bible Seminary and as spokesperson for the American Association of Bible Colleges, a professional accrediting agency representing approximately 100 institutions throughout the United States, I submit the following statement to the Senate Committee on Labor and Human Resources. We wish to voice our chief concern relative to Senate bill 557 which seeks "to restore the broad scope of coverage and to clarify the application of Title IX of the Education Amendment 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964."

The chief concern which I would like to address today is the legislation's potential to require institutional sponsorship of abortion, which is already in the Education Department regulations. As we understand the impending legislation, it's ultimate effect would be to require private colleges which receive federal financial assistance (or to which federal financial assistance is imputed because students receive federal grants or federal loan guarantees) to sponsor abortion in various ways (insurance, leaves of absence, medical services, etc.). This requirement is not warranted by the underlying Civil Rights Act of 1964 or the Education Amendments of 1972.

Our opposition to abortion is based on our understanding of the sanctity of life as well as the commencement of life as presented in the Bible. The Bible teaches that a fetus is a unique, living being prior to its physical departure from the womb (Psalm 139:15-16; Jeremiah 1:5; Luke 1:41, 44). The Bible also teaches that it is wrong to take an innocent life (Exodus 20:13). We ask, as did our Surgeon General, Dr. C. Everett Koop, in his book, *Whatever Happened to the Human Race?*, "At what point in time can one consider life to be worthless and the next minute precious and worth saving?" (Revell, p. 37). All of the institutions who are members of the American Association of Bible Colleges are committed to the authority of God's moral imperatives as revealed in the Bible, and this includes a strong commitment to the sanctity of human life.

We are concerned that an ill-conceived or poorly worded piece of legislation could have the effect of forcing our institutions, and other Christian colleges and universities that are opposed to abortion, into an untenable position. Most of our institutions do not accept direct federal financial assistance. However, many students particicipate in partial Title IV aid which includes the Pell Grant, the Supplemental Educational Opportunity Grant (SEOG), College Work Study, the Guaranteed Student Loan (GSL) program, and veterans educational benefits. We would be required to force an undue hardship on those students who have chosen to attend our institutions by denying them access to these funds they need to attend college.

We do not want Congress to adopt a "double standard" to benefit Bible colleges or other Christian colleges. To maintain a double standard is a breach of traditional Judeo-Christian morality. It was Christ, Himself, who summarized all of God's commands in two basic tenants: You shall love the Lord your God with all your heart, and with all your soul, and with all your mind; and You shall love your neighbor as yourself (Matthew 22:36-40). We would all agree that if these principles were followed in the United States there would be no need for Civil Rights legislation.

Our organization favors Civil Rights legislation to the extent that it seeks to correct what we feel are unbiblical attitudes of prejudice and hatred that have existed for too long in our country. However, we feel that Congress is now in danger of "throwing out the baby with the bath." There is no evidence that Congress, in a measure against "discrimination on the basis of sex", intended to foreclose the maintaining of traditional standards of moral conduct and parental responsibility in private institutions, simply because they receive some measure of direct or indirect federal financial assistance. Nor is there evidence that Congress intended to impose practices that violate the very moral fabric on which Bible colleges and other Christian institutions are grounded (such as requiring those schools to sponsor abortions).

It is our desire and prayer that our country someday have a constitutional amendment that would protect the lives of its unborn citizens. However, we recognize that this is a pluralistic country and that Congress must respond to the voices of many different, and often disparate, groups. It often takes the wisdom of a Solomon to craft legislation that meets the needs of a majority of our citizens without imposing undue hardship on the minority who are adversely affected. Such is the case with this impending legislation. We would urge the Senate Labor and Human Resources Committee to adopt an "abortion neutral" amendment that would state that no institution covered would be required to sponsor or not to sponsor abortion or abortion-related services. The Tauke-Sensenbrenner amendment to H.R. 700 on May 21, 1985 might serve as an appropriate model. Their amendment reads:

> Nothing in this title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion.

We believe that the adoption of such "abortion neutral" language would protect the religious beliefs of those organizations to whom abortion is a moral evil while also not imposing those beliefs on other organizations or groups that favor abortion. Thank you for considering our request.

בס״ד

Agudath
Israel
of America
אגודת ישראל באמעריקא

David Zwiebel, Esq.
Director of Government Affairs
General Counsel

April 7, 1987

Honorable Edward M. Kennedy
Chairman
Senate Committee on Labor and Human Resources
113 Russell Senate Office Building
Washington, D.C. 20510-6300

Honorable Orrin G. Hatch
Ranking Minority Member
Senate Committee on Labor and Human Resources
135 Russell Senate Office Building
Washington, D.C. 20510-6300

Re: S.557, the "Civil Rights Restoration Act of 1987"

Dear Senators Kennedy and Hatch:

On March 12, I wrote to say that I would appreciate receiving an invitation to appear before the Committee on Labor and Human Resources to testify on behalf of Agudath Israel of America regarding the proposed Civil Rights Restoration Act of 1987, just as I testified on the similar bills introduced in years past.

It has now come to my attention that the committee has since held two days of hearings on the bill, and that no further hearings are scheduled. That being the case, I am taking the liberty of enclosing herewith a memorandum summarizing the points I would have made had I been invited to testify. If timely and appropriate, I would appreciate it if you would have the memorandum included in the record.

As detailed in the memorandum, Agudath Israel of America supports the basic objectives of the bill but remains concerned about several of its potential implications for faith related institutions. I believe that many if not all of our concerns can be resolved through simple amendment or even legislative history that will not dilute the basic impact or objectives of the bill.

I hope the Committee will give serious attention to our concerns and work with us in resolving them. Many thanks.

Sincerely,

David Zwiebel

David Zwiebel

Enclosure
cc: Members of the Senate Committee on Labor and Human Resources

84 William Street, New York, N.Y. 10038 (212) 797-9000

בס״ד

COMMISSION ON LEGISLATION AND CIVIC ACTION

Agudath Israel of America
אגודת ישראל באמעריקא

Professor Aaron Twerski
Chairman

David Zwiebel, Esq.
Director of Government Affairs and General Counsel

Morton M. Avigdor, Esq.
Executive Director and Associate General Counsel

Regional Offices:
California
Illinois
Maryland
Massachusetts
New Jersey
New York
Ohio

April 7, 1987

MEMORANDUM

TO: Members of the Senate Committee on Labor and Human Resources

FROM: David Zwiebel, Director of Government Affairs and General Counsel DZ

SUBJECT: S.557, The "Civil Rights Restoration Act of 1987"

Agudath Israel of America is a national Orthodox Jewish movement with chapters in 30 states, tens of thousands of members, and 19 divisions operating out of central headquarters in New York. Among its other activities, Agudath Israel of America frequently presents to government bodies perspectives on public policy issues reflecting the views and concerns of the approximately 500 elementary and secondary schools under the umbrella of the National Society for Hebrew Day Schools and the approximately 60 secondary schools affiliated with the Association of Advanced Rabbinical and Talmudic Schools.

This memorandum sets forth our views on S.557, the "Civil Rights Restoration Act of 1987." In a nutshell, we support the basic objectives of the bill but remain concerned about some of its potential implications for faith related institutions.

Agudath Israel of America and its constituents are no strangers to issues of civil rights. Since its inception 65 years ago, Agudath Israel has been in the forefront of advocating and defending the civil rights of American Orthodox Jews, whose dress, diet and religious observance often set them conspicuously apart from the mainstream of American society. Agudath Israel is thus extremely sensitive to abrogations of civil rights, and has consistently supported laws designed to combat invidious discrimination.

84 William Street, New York, N.Y. 10038 (212) 797-9000

In that connection, Agudath Israel has long emphasized that the right freely and fully to practice one's religion is one of the most fundamental of all the civil rights. Accordingly, we have reviewed S.557 with a particular eye toward its potential impact on faith related institutions. Having done so, we reluctantly must express our reservations about the bill as it is currently written.

Specifically, our concerns regarding the bill's potential impact on religiously affiliated organizations are these:

1. "School System". In amending four separate civil rights laws, the bill would define "program or activity" to include "all of the operations of " . . . a "school system" . . . "any part of which is extended Federal financial assistance." In this context, would the phrase "school system" -- which the bill does not formally define -- include all Orthodox Jewish institutions across the country? Would extension of federal financial assistance to one such school trigger coverage of all the others? We would hope not; any affiliation or connection among the Jewish schools whose views and concerns we represent is loose, at best. But whether or not a court ultimately would uphold our view on that question is almost beside the point, inasmuch as any "private attorney general" could tie up a school for years in burdensome, expensive and vexatious litigation until the issue would be resolved.

We are thus opposed to having the bill's coverage extend to an entire "school system" when one school within the system is a recipient of federal aid. At a minimum, Congress should define "school system" with precision and circumspection, so that the phrase would encompass only closely related entities whose policies and practices are determined by one central body at one central location.

2. Coverage of Non-Funded Activities. The bill would interpret "program or activity" in a way that could be read to require a religious or charitable organization that operates one federally funded activity to comply with each of the civil rights laws in all of its non-funded activities as well. This would impose an onerous and unwarranted burden -- in terms of paper work and substantive compliance -- that might have an unfortunate "chilling effect" on any religious or charitable organization seeking federal financial assistance to help provide charitable services to needy persons.

Consider, for example, a religious organization that operates a number of privately funded charitable social service projects. To be eligible for federal financial assistance to help it carry out one of its projects, the organization would have to expend considerable sums to make all of its facilities and projects accessible to the handicapped. It would also have to hire additional administrative and clerical personnel to ensure organization-wide compliance with the civil rights laws and to fill out the plethora of forms necessary to satisfy an voracious federal bureaucracy. Obviously, the organization would think twice before applying for the federal assistance.

The likely impact of this provision would thus be to restrict the pool of federal financial assistance applicants to wealthy organizations that could afford to pay the clerical and substantive costs of civil rights compliance not just in connection with the funded program, but on an organization-wide basis. Does Congress really want, in the name of civil rights, to preclude less affluent groups from obtaining federal dollars to help the needy?

3. Title IX Religious Exemption. Given the expansive definition of "program or activity" that would govern Title IX, and given the pro-abortion and other religiously objectionable provisions of the Title IX regulations, it is especially important that the statutory exemption in Title IX for religious schools be broad enough to cover any entity that legitimately cannot comply with certain aspects of Title IX without compromising its tenets. Unfortunately, the language of the existing exemption -- which permits a recipient institution that is "controlled by a religious organization" to claim exemption from specific aspects of Title IX that are not consistent with the controlling organization's religious tenets -- may not go far enough.

Agudath Israel supports expansion of the Title IX exemption so that it would cover not only entities that are "controlled by a religious organization," but also those that are "closely identified with the tenets" of a particular denomination. It is noteworthy that there already exists precedent for such language; section 752(e)(2) of the Higher Education Amendments of 1986 states that the College Construction Loan Insurance Association Program's prohibition against discrimination on the basis of religion "shall not apply to an educational institution which is controlled by or which is closely identified with the tenets of a particular religious organization if the application of this section would not be consistent with the religious tenets of such organization." [Emphasis added.]

4. Determining Recipiency of Federal Financial Assistance. Finally, there is the need to clarify the circumstances under which an institution will be deemed a recipient of federal

financial assistance. In the first part of its Grove City ruling, the Supreme Court held that indirect aid to an educational institution -- *i.e.*, aid provided by government to the student, who in turn chooses to use it at a particular institution -- renders the institution itself a recipient. We are troubled by that expansive reading of the statutory phrase "receiving federal financial assistance," especially in view of S.557's expansive definition of "program or activity."

We believe that when an institution's connection with federal assistance is only tenuous, the law should not be so quick to assert federal civil rights jurisdiction. At a minimum, Congress should clarify that an institution's tax exempt status would not, in and of itself, be deemed a sufficient basis upon which to trigger statutory coverage.

In addition, if Congress does agree with the first part of the Grove City decision, it should remove the existing ambiguity in the language of Title IX which speaks in terms of institutional recipiency when it really means student recipiency. We would recommend that the operative language of Title IX be amended to state explicitly that coverage is triggered not only when the institution itself receives federal financial assistance, but also when it admits students who receive such assistance. That could be achieved by adopting language along the following lines: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination by, any education program or activity conducted at any educational institution that receives, or enrolls any student who receives, federal financial educational assistance."

* * *

Note that most, if not all, of the concerns identified in this memorandum can be allayed by simple amendment or legislative history without affecting the basic structure or objectives of the bill. Agudath Israel would be happy to work together with committee staff to help design appropriate amendment language or legislative history to alleviate these concerns.

In conclusion, we reiterate that Agudath Israel of America is fully supportive of laws that promote civil rights. We urge only that in doing so, Congress not overlook the important fact that religious rights are civil rights too.

D.Z.

UNITED STATES CATHOLIC CONFERENCE
1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005 • 202/659-6606

Office of Government Liaison

May 6, 1987

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing you concerning an amendment defining the coverage of church institutions which the United States Catholic Conference is seeking to the proposed "Civil Rights Restoration Act," S.557. After several conversations with your Committee Staff, we believe there is a way to resolve some of our concerns involving institutional coverage, through clarifying language in your Committee Report, better defining certain ambiguous provisions now contained in S.557.

For your consideration we are submitting such report language with this letter. If this clarifying report language is acceptable, we would appreciate your confirming this with us prior to the committee mark-up of this bill, and conveying it in a colloquy during mark-up. If in the context of the final Committee Report, this language adequately addresses our concerns, the USCC will reconsider the need for seeking an amendment to define the coverage of church institutions. Please note that the enclosed language does not address the "school system" question, an issue which we hope you will address.

Thank you for your consideration of our concerns.

Sincerely,

Frank J. Monahan
Director

FJM/ftt

Enclosure

cc: The Honorable Daniel P. Moynihan

Committee Report Language - S.557*/

Private organizations have expressed concern with the ambiguity of certain language in the new definitions of "program or activity" in the four statutes. Specifically, they are concerned with how phrases such as "if assistance *is extended [to a* private organization] ... as a whole", "principally engaged in", and "any other entity which is comprised of two or more of the entities described in" will be interpreted. The Committee recognizes some uncertainty in the language in the new definition of "program or activity", and provides this clarification of its intent.

Receiving Assistance "As A Whole"

The concept of receiving federal financial assistance "as a whole" was included in the definition to apply to those situations in which general, non-categorical aid, such as the Chrysler bail out funding, is provided for the general benefit and use of an entire private organization. The Committee does not include a "freeing up" theory (i.e., assistance to one part of an organization frees up funds for use elsewhere in the organization) in the "as a whole" concept. This concept would not apply to churches and other religious organizations which do not receive general, non-categorical or unrestricted assistance. Thus, for example, the participation of one agency or other subunit, whether separately incorporated or not, in a particularized federal program would not trigger coverage for all of the organization's activities. It is not intended to subject all of the myriad religious, charitable, educational and other similar activities of religious organizations, such as a Catholic diocese, to coverage under this provision simply because one activity receives assistance. Only those agencies, institutions, departments or other subunits which actually receive federal assistance would be subject to coverage.

"Principally Engaged In"

Because of their religious activities, churches, dioceses and other religious organizations would not be considered to be

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*/ The language suggested would need to be placed in the proper context and structure of the Committee Report.

"principally engaged in the business of providing education, health care, housing, social services or parks or recreation", even though they may conduct a number of programs in these areas.

"Any Other Entity"

Further, it is not the Committee's intent that a church, diocese or other similar religious organization would be considered as "any other entity" comprised of two or more of any of its subunits. Only those subunits which actually receive federal assistance would be subject to coverage.

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Office of Government Liaison

May 14, 1987

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human
  Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

After receiving my May 6, 1987 letter (copy enclosed) concerning the coverage of church institutions under S.557, the Civil Rights Restoration Act of 1987, your Committee staff suggested the attached proposed colloquies, the substance of which would be included in the Committee Report, as a possible solution to our concerns.

This approach has merit. In the context of the Committee markup, the colloquies would be an acceptable way of clarifying the uncertainty with some of the language in the bill. If in the context of the final Committee Report the substance of the colloquies and the need for clarifying the uncertainty are incorporated in a manner which adequately addresses our concerns, the USCC will reconsider the need for seeking a floor amendment to define the coverage of church institutions. To facilitate this result, we recommend close coordination between our respective staffs in the development of the Committee Report. We note that the enclosed language does not address the "school system" question, an issue which we hope you will address.

Thank you for your consideration of our concerns.

Sincerely,

Frank

Frank J. Monahan
Director

FJM/spw

Enclosures

cc: The Honorable Daniel P. Moynihan

COLLOQUY BETWEEN SENATOR KENNEDY AND SENATOR ________ TO CLARIFY THE INTENT OF SECTION 3(A) OF THE CIVIL RIGHTS RESTORATION ACT

SENATOR _____: Mr. Chairman, as you are aware, a number of concerns have been raised with respect to the intent of Section 3(A)(i) as it applies to religious organizations. I hope that we will be able to clarify precisely what is meant by the phrase "as a whole" to ensure that future interpretations do not misconstrue our intent.

Mr. Chairman, will you please explain what your understanding of this provision is?

CHAIRMAN KENNEDY: The concept of a corporation or other private organization receiving federal financial assistance "as a whole" refers to situations where the corporation receives general assistance that is not designated for a limited specific purpose. Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a corporation "as a whole." A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if that is only one among a number of activities of the organization. Nor does S. 557 embody a notion of "freeing up." Federal financial assistance to a corporation for limited, categorical purposes does not become assistance to the corporation as a whole simply because receipt of the money may free up funds for use elsewhere in the company.

WHICH RECEIVE FEDERAL AID ARE COVERED BY THE ANTIDISCRIMINATION LAWS. BOTH THE PARISHES AND THE DIOCESE ARE ENTITIES DESCRIBED IN PARAGRAPH (B), THEREFORE PARAGRAPH (4) WOULD NOT APPLY.

RESPONSE TO HATCH AMENDMENTS NO. 8 AND NO. 9

--THIS AMENDMENT IS SUPERFLUOUS AND I URGE MY COLLEAGUES TO REJECT IT.

--THE KENNEDY-WEICKER AMENDMENT CLARIFIES THAT SUBSECTION 4 APPLIES ONLY TO ENTITIES OTHER THAN THOSE DESCRIBED IN (1), (2), OR (3).

--ALL OF THE ENTITIES DESCRIBED IN THE HATCH AMENDMENT ARE COVERED UNDER SUBSECTION 3 AS PRIVATE CORPORATIONS AND/OR PRIVATE ORGANIZATIONS.

--WE SHOULD NOT BURDEN THE BILL WITH LISTS OF WHAT IS NOT COVERED.

FOR EXAMPLE, IN A CATHOLIC DIOCESE WHERE 3 PARISHES RECEIVE FEDERAL AID, THE PARISHES ARE GEOGRAPHICALLY SEPARATE FACILITIES WHICH RECEIVE FEDERAL AID, AND THE DIOCESE IS A CORPORATION OR PRIVATE ORGANIZATION OF WHICH THE PARISHES ARE A PART. ONLY THE THREE PARISHES [illegible]

SECTION 3(A)(II) WOULD NOT APPLY TO A CHURCH, EVEN IF THE CHURCH OPERATED EDUCATION, HEALTH CARE OR SOCIAL SERVICES PROGRAMS, BECAUSE A CHURCH IS PRINCIPALLY ENGAGED IN THE BUSINESS OF RELIGION. A SEPARATELY INCORPORATED RELIGIOUS SCHOOL WHICH IS NOT PART OF A SCHOOL SYSTEM, AND WHICH PARTICIPATES IN THE SCHOOL LUNCH PROGRAM, WOULD BE COVERED IN ITS ENTIRETY UNDER SECTION 3(A)(II) AS A CORPORATION PRINCIPALLY ENGAGED IN THE BUSINESS OF EDUCATION.

UNITED STATES CATHOLIC CONFERENCE
1312 MASSACHUSETTS AVENUE, N. W. · WASHINGTON, D. C. 20005 · 202/659-6606

Office of Government Liaison

MEMORANDUM

To: Members of Senate Committee on Labor and Human Resources

From: FJM Frank J. Monahan, Director

Date: April 30, 1987

Re: The Civil Rights Restoration Act of 1987, S.557

I am informed that Senator Gordon Humphrey will be offering the enclosed "abortion-neutral" amendment to S.557 in Committee, and that the enclosed amendment defining the coverage of church institutions will be offered as well. Both deal with the problems which the United States Catholic Conference has raised. Enclosed is a copy of our testimony which details our request for these two amendments.

I urge you to support these amendments. As our testimony made clear, these amendments are necessary to make it possible for the USCC to support S.557.

We understand that Senator Orrin Hatch will offer an amendment at the request of the National Association of Independent Colleges and Universities (NAICU), to broaden the religious tenets exception. We are generally sympathetic to their concerns in this area and would be supportive of an appropriate amendment.

FJM/ftt

Enclosures

American Association of University Women

2401 Virginia Avenue, NW, Washington, DC 20037
(202) 785-7700

President
Sarah Harder

June 9, 1987

Dear Senator:

On behalf of the 175,000 members of the American Association of University Women, I urge you to support the **Civil Rights Restoration Act of 1987 (S. 557)**. AAUW, a national organization of college-educated women, strongly supports legislation designed to prevent discrimination in federally-funded institutions, specifically, legislation that reaffirms Congress' intent that federal funds not be used to discriminate on the basis of race, color, national origin, gender, disability or age.

The Civil Rights Restoration Act of 1987 clarifies Congress' intent to protect racial and ethnic minorities, women, disabled persons and the aged that a narrow interpretation by the Supreme Court rendered ineffective. In the 1984 case, Grove City College v. Bell, the Supreme Court ruled that a federal grant recipient must ensure nondiscrimination only in the program which actually receives the federal funds, rather than in all of its operations. This decision effectively undermined the laws that form the backbone of the legislative attack on discrimination.

AAUW supports an unamended Civil Rights Restoration Act. Proposed amendments to the bill are not only irrelevant to the CRRA, but actually create legal basis for discrimination in new areas. An amendment ostensibly designed to ensure that Title IX does not force any institution to perform abortions actually favors anti-choice factions. The language would allow federally-legislated discrimination against persons who have had, or want abortions. The amendment not only violates the restoration principle of the Act, but is unneccessary, for under Title IX, no institution is required to perform an abortion. The religious tenet amendment to S. 557 is similarly contrary to the spirit of the CRRA. Under this amendment, an institution with any religious affiliation need only find a religious tenet that matches its discriminatory policies to continue to receive federal funds.

Hundreds of legitimate discrimination cases have been rejected since the Grove City College decision gutted the civil rights laws. It is crucial that this misinterpretation of the intent of the civil rights laws be corrected immediately to prevent federally-funded discriminations against countless Americans. I urge you to support the Civil Rights Restoration Act of 1987, without amendments.

Sincerely,

Sarah Harder

Sarah Harder, President

Leadership Conference on Civil Rights

2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
202 667-1780

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THE RELIGIOUS TENET AMENDMENT MUST BE DEFEATED

I. The Amendment Goes Beyond Restoration

A religious tenet amendment to Title IX was introduced and defeated by a vote of 11 to 5 in the Senate Labor and Human Resources Committee. Such an amendment does not belong in the Civil Rights Restoration Act -- which seeks only to restore the coverage of Title VI, Title IX, Section 504 and the Age Discrimination Act. Moreover, if passed, the amendment would gut Title IX as it applies to thousands of private schools around the country.

II. The Amendment Vastly Expands the Current Title IX Religious Institution Exemption

Title IX now provides that an institution "controlled by a religious organization" may become exempt from compliance with any Title IX non-discrimination requirement the institution believes is contrary to its religious tenets. The religious loophole amendment would allow such an exemption for any institution "closely identified with the tenets" of a religious organization.

III. Thousands of Institutions Would be Free to Discriminate With Federal Funds

Under this amendment, an institution need only claim it is "closely identified" with a religious tenet to qualify for the exemption. The amendment does not require that the institution have had any connection at any time with a religious organization.

The National Center for Education Statistics reports that there are more than 3,000 higher education institutions, at least a quarter of which report a religious affiliation. Under this amendment, however, these schools would just head the list of those able to apply for the exemption. Indeed, any private elementary or secondary school that wished to discriminate would need only to find a religious tenet to match its discriminatory policies, and then claim a close identification with the tenet.

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IV. The Discrimination Allowed is Open-Ended

The religious tenet amendment applies to any Title IX requirement. For example:

-- A school could claim it must fire married women with pre-school age children because it is against the school's religious tenets for such women to work outside the home. (Just last term, the Supreme Court refused to insulate the Dayton Christian School, which had this very policy, from state anti-discrimination laws.)

-- A school could refuse to admit students who are divorced or married to divorced persons. (The Office for Civil Rights has been asked to exempt such a policy.)

-- A school could assert, as did one to OCR, that:

> "[S]ince the Scriptures teach that the husband is the head of the wife...a woman whose employment came in conflict with her marriage obligations would be expected to be in submission to her husband. On this basis, the College may find it necessary to make an employment decision based upon marital status."

Such a license to discriminate with federal funds should not be granted to any institution merely claiming "identification" with a religious tenet.

V. Such a Broad Exemption is Unprecedented in Civil Rights Law and Would Sanction Sex Discrimination

Federal law does not generally grant immunity from anti-discrimination laws to religious organizations. Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination, contains certain exemptions for religious organizations including schools, but limits those exemptions to "religious discrimination," i.e. favoring members of the same religion in employment. Title VII has not generally been interpreted to permit race or sex discrimination on the grounds that religion requires it. In contrast, if the amendment is approved, institutions with tenuous religious connections would be free to discriminate in the admissions of students, in rules regarding the marital and parental status of students and employees, and in access to particular course offerings and extracurricular activities. For example, such an institution could with impunity invoke a religious tenet that it is unseemly for women to participate in athletic activities. Such a broadening of the exemption would tear a gaping hole in Title IX protections.

VI. No School Has Ever Been Denied an Exemption Under Title IX

The Title IX exemption now in the law allows institutions controlled by religious organizations to be exempt from any provision in conflict with its religious tenets. No school that has submitted a completed application to the Office for Civil Rights has been denied an exemption. In a letter dated May 19, 1987, to Senator Kennedy, the Office for Civil Rights stated:

> "OCR has never denied a request for religious exemption. No requests for religious exemption are pending at this time."

#####

Leadership Conference on Civil Rights

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THE ABORTION AMENDMENT TO S. 557 MUST BE DEFEATED

An abortion amendment to Title IX was introduced and defeated by a vote of 11 to 5 in the Senate Labor and Human Resources Committee. The Amendment provides:

> "Nothing in this Title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion. Nothing in the preceding sentence shall be construed to authorize a penalty to be imposed on any person because such person has had a legal abortion."

I. The Abortion Issue Does Not Belong in the Civil Rights Restoration Act Debate

The sole purpose of the Civil Rights Restoration Act is to restore the coverage of Title VI, Title IX, Section 504 and the Age Discrimination Act to what it was before the narrowing Supreme Court decision, Grove City College v. Bell. From the outset, supporters of the legislation agreed that this bill must be limited to the issue of coverage, and that it should not be the vehicle to reexamine all of the civil rights laws' substantive requirements. Although the requirements of each of these laws could be strengthened, the bill deals only with how much of an entity is covered -- not with what it must do once it is covered. The abortion amendment is directly contrary to this principle.

II. Claims that S. 557 Expands Abortion Protections, and That Hospitals will Have to Perform Abortions, Are False

Throughout the consideration of the Civil Rights Restoration Act in 1984, no claim was made that abortion rights would be extended by passage of the bill. And, in reviewing the Civil Rights Restoration Act now under consideration, in a memorandum dated February 26, 1985, the General Counsel of the United States Catholic Conference correctly stated that "neither bill [House or Senate] would create any new abortion rights..."

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Nonetheless, claims are being made that the Civil Rights Restoration Act extends abortion rights. In particular, it is claimed that S. 557 will require hospitals to perform abortions. This claim is clearly wrong. The Title IX regulations simply do not require any institution, including a hospital, to perform abortions. The Committee Report accompanying S. 557 so states (p. 26). (Moreover, the regulatory health coverage requirements concerning pregnancy, abortion, childbirth, etc., apply only with respect to students and employees of educational programs -- not to a hospital's patients.) Under S. 557 the law with respect to abortion remains as it has been; it will not, as it has not, mandate the performance of abortions.

III. The Abortion Amendment Takes Protection Against Discrimination Away From Persons Who Have Had Abortions

Under the terms of the amendment, Title IX would provide no "right relating to abortion." Therefore, the amendment expressly nullifies any prohibition against abortion discrimination, including discrimination against persons who have had abortions. Although the amendment states it does not *authorize* a penalty to be imposed on a person who has had a "legal" abortion, it does not *prohibit* such a penalty. Therefore, this nonauthorization of a penalty means that institutions are not being directed to discriminate by the statute, but clearly, under the amendment, they may discriminate if they so choose.

Such discrimination has been prohibited by Title IX regulations since they were first promulgated by then-Secretary of HEW Caspar Weinberger in 1975. Title IX regulations proscribe discrimination on the basis of "pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom." These protections apply to both students and employees. 34 C.F.R. §§106.40(b)(1), 106.57(b). And they prohibit a range of activities. For example, recipients may not exclude students from an education program or activity, including any class or extracurricular activity. 34 C.F.R. §106.40(b)(1). Similarly, recipients must treat "pregnancy, false pregnancy, termination of pregnancy and recovery therefrom" the same as any other temporary disability for leave, or for medical or hospital plans. 34 C.F.R. §§106.40(b)(4), 106.57(c).

IV. Supporters of the Abortion Amendment Have Made No Efforts to Secure the Withdrawal of the Title IX Regulations

While insisting that an abortion amendment be a part of S. 557, in violation of the restoration principle, supporters of the amendment have made no effort whatever to secure the withdrawal of Title IX regulations at issue. The current Administration has chosen not to withdraw these regulations, and apparently has not been asked to do so, despite its withdrawal of many regulations in other areas. Moreover, the Administration has been willing to change, and in fact has changed, even long-standing administrative regulations in other areas. Claims that the only way to nullify the Title IX abortion regulations is through amendment of S. 557 ring hollow when the Administration is free to withdraw the regulations at any time if it so chooses and proceeds in the proper manner.

The argument that withdrawal of the regulations would not be sustained in court because the regulations are long-standing has not deterred regulatory changes in other contexts, changes that have survived court challenge.

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American Hospital Association

AHA

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STATEMENT OF THE
AMERICAN HOSPITAL ASSOCIATION
SUBMITTED TO THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
OF THE UNITED STATES SENATE
ON THE
CIVIL RIGHTS RESTORATION ACT OF 1987 (S.557)

The American Hospital Association (AHA), which represents over 5,600 member hospitals and health care institutions, as well as more than 40,000 personal members, is pleased to have this opportunity to present its views to the Senate Committee on Labor and Human Resources concerning S.557, the "Civil Rights Restoration Act of 1987."

INTRODUCTION

S.557 has been introduced by its sponsors with the stated intention of restoring the scope of civil rights protection that had been limited by recent Supreme Court decisions, including the Court's decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), in which the Court held that Title IX of the Education Amendments of 1972, and its enforcement mechanisms, were program-specific in their coverage. Because three other statutes (section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and

Title VI of the Civil Rights Act of 1964), contain language virtually identical to that of Title IX considered by the Court in Grove City, S.557 would amend all four statutes redefining "programs or activities" receiving federal financial assistance. That term is then very broadly defined, and the enforcement scope of the subject statutes is thereby broadened, beyond, in our opinion, pre-Grove City law.

AHA and its members believe that in focusing on the legislative repeal of Grove City, the drafters of the bill have enmeshed themselves in the definition of what constitutes a covered entity, and have not confronted essential difficulties of the bill that can only be resolved if Congress clarifies the matter of what constitutes federal financial assistance.

Additionally, hospitals are concerned with the extended enforcement thrust of S.557, not because civil rights laws should not be enforced, but because, especially as applied to hospitals, the potential termination of funds, inherent in the extended definition of "program or activity," threatens to contradict the fundamental purpose of both the civil rights laws and medical treatment itself. It seems both anomalous and unfair to extend penalties in such a way that their real target becomes the patient, who is the true recipient and beneficiary of federal assistance. This consideration affects not only the matter of penalties, but again relates to what should be considered a "program or activity" and what should be considered "federal financial assistance."

AHA both understands and supports the laudable intention of the sponsors of the bill to ensure that the federal civil rights laws have appropriate coverage and effect. Indeed, AHA and its membership wholeheartedly endorse the purposes and objectives of these laws to eradicate discrimination on the basis of race, creed, color, sex, national origin, age, or handicap. Therefore, in addressing S.557, hospitals are not suggesting that they be excluded from appropriate requirements for non-discrimination. Instead, AHA is desirous of assisting this Committtee and the Congress in developing practicable and effective legislation, while avoiding unintended pitfalls that could lead to confusion, excessive regulation, and wasteful litigation.

1. The Definition

The proposed definition of "program or activity" allows broad and uncertain interpretation. The result could be the expansion of enforcement activities into vast and uncharted areas, without benefit of thoughtful deliberation, experience, or guidance.

The proposed definition of "program or activity" is in fact a great deal broader than ever before recognized under federal law. First, under current regulations, the "program and activities" covered are only those specifically funded, and not all activities of the recipient, as is now proposed. Additionally, indirect coverage is radically expanded by the addition of the clause "all of the operations of." Second, the meaning of "assistance to be extended" is not defined in the bill and does not exist in present regulations. The primary effect of the proposed alteration is a troublesome extension of legal and regulatory strictures throughout entire institutions if any one of its activities or elements is the direct or indirect recipient of federal aid.

Many questions therefore are unanswered in the proposed definition. For example, what is the definition of "principally engaged in"? How does it apply to a tie-in between an "assisted" institution and various subunits? Of more pertinence to the membership of AHA, would a university hospital be subject to automatic coverage merely by virtue of the receipt by undergraduates of "Pell Grants"? What of a hospital or, for that matter any type of research or teaching facility, only affiliated contractually (or even less formally) with a university? In addition, the proposed definition compounds the confusion by ending with the catch-all concept of "any combination comprised of two or more entities" as described in preceding sections defining covered programs.

In similar fashion, it has been suggested that receipt of federal financial assistance by any state or municipal entity could trigger statutory coverage of virtually the entire state or municipal government and all those functions operated, directed, and even regulated by it. Many hospitals are legal entities of state or local governments, and so this issue is of great concern to hospitals. However, it goes much further. S.557 extends coverage, and all of the administrative responsibilities and regulatory burdens that go with it, to myriad governmental departments, collectively and individually, if any of them, be it a fire department, a police department, even a library, receives a federal grant. Regulatory responsibilities could even be asserted as to the purely private entities, some of which are hospitals, that contract with governments.

Irrespective of the need to rectify perceived shortcomings of the Grove City decision, the law requires a clear nexus between Federal assistance and the affected program or activity. The proposed definition would obscure, and not clarify, that nexus.

3. AHA's Legislative Suggestions

AHA is confident that reasonable legislative results can, and will, be reached. Following are several suggestions that AHA believes can help achieve that end.

a. Tailoring enforcement terms

Under S.557, the current public and private mechanisms of enforcement of the civil rights laws would be maintained, but the remedy--the termination of funding--would be expanded from the program as to which discrimination has been found, to the entity as a whole. If the broad language is retained, or even if it is clarified, the Committee should contemplate at least the definitional limitation of the terms that define the scope of the funding stoppage.

The reason for clarification or limitation is manifest, especially when consideration is given to the applicability of the bill to hospitals. The remedy to be imposed upon a finding of discrimination in any part of a university or corporation is the termination of funds to all parts. Therefore, even though the hospital is providing health care services in a nondiscriminatory manner, the persons adversely affected by the funding

[illegible]

In addition, [illegible]

B. Defining Federal Financial Assistance

S.557 does not define "Federal financial assistance," [illegible]

It is not surprising that S.557 does not address [illegible]

Grants because the legislative history of the act enabling those grants makes it clear that Congress intended just that. However, the reach of S.557 extends far beyond the realm of "Pell Grants." With respect to most entities touched by federal programs, Congress has said nothing about who should be deemed a recipient of federal financial assistance.

As we have noted, none of the laws subject to S.557 defines federal financial assistance. Neither is there a large body of case law on the issue. However in June 1986, the United States Supreme Court decided U.S. Department of Transportation v. Paralyzed Veterans of America, 106 S.Ct. 2705, (1986), a case that placed the issue of what constitutes federal financial assistance squarely in controversy. In that case the veterans' organization contended that federal aid to airports constitutes a form of federal financial assistance to airlines, and therefore the airlines come within the scope of Sec. 504 of the Rehabilitation Act of 1973. The Court rejected this argument, holding that "Section 504's scope is limited to those who actually 'receive' federal financial assistance." The Court sought to distinguish between intended "beneficiaries" and intended "recipients" who Congress clearly made subject to federal regulation. In addition, the Court stated that in order for federal funds to trigger coverage, such funds must be subsidies, not payments for services.

Following this view, a supermarket that obtains payment through the food stamp program, a landlord who ultimately receives governmentally subsidized rents, or a medical care provider whose remuneration is tendered through Medicare or Medicaid, should not be classified as having received federal financial assistance. The persons who receive the benefits of such programs--the consumer, the tenant, or the patient--are obtaining federal assistance, but the ultimate recipients of the money are receiving payment for services.

The federal programs most affecting hospitals are Medicare and Medicaid. Both of these represent governmental purchases for services on behalf of program beneficiaries. Medicare (enacted in 1965 as Title XVIII of the Social Security Act, 42 U.S.C. sec. 1395, et seq.) is an exclusively federal program providing hospital and supplementary medical benefits to the aged and disabled. Medicaid (also enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. sec. 1396, et seq.) is a medical-assistance program operated by both federal and state governments for impoverished persons who are aged, blind, or disabled, or for members of families with dependent children.

Under appropriate determinations and contracts, Medicare pays no more than a predetermined price for each category of case. Medicaid pays no more than an amount theoretically targeted to compensate the hospital for the reasonable price or costs of services provided. Such payments certainly are not designed to exceed actual hospital costs and, typically, they are significantly less. Thus, to the extent that "assistance" flows in any direction, it flows from hospitals to the government or to Medicare and Medicaid beneficiaries.*/

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*/ One court has held that Medicare and Medicaid constitute federal financial assistance within the meaning of section 504 of the Rehabilitation Act. United States v. Baylor University Medical Center, 736 F.2d 1039, (5th Cir. 1984), cert. den. 53 U.S.L.W. 3528 (U.S. 1985). However, this appeals court decision preceded the U.S. Supreme Court holding in U.S. Dept. of Transportation v. Paralyzed Veterans of America, discussed above.

Irrespective of whether Medicare and Medicaid constitute federal financial assistance to hospitals, it is clear that hospitals are subject to a multiplicity of laws that prohibit discrimination as to the fundamental relationship between hospitals and their employees and between hospitals and their patients. For example, the employees of a typical hospital are protected against racial discrimination by Title VII of the Civil Rights Act of 1964 and by 42 U.S.C. S. 1981, the post-Civil War act. These employees are similarly protected by Title VII against sex, religion, and national origin discrimination, and by the Age Discrimination in Employment Act of 1967 as to age discrimination. Handicapped employees also are protected by section 503 of the Rehabilitation Act. Hospital patients are protected to the extent that any program or activity encompassing them is the recipient of direct federal funding. They are also protected by 42 U.S.C. S.1981 and S.1983 against racial discrimination as to the conditions of their treatment and accommodations, as well as by the Medicare conditions of participation and Hill-Burton regulations. It should also be noted that virtually all hospital patients are ill or handicapped. The mission of hospitals is to treat such persons, and discrimination on those bases would be contradictory of hospitals commitments.

Obviously, hospitals are the entities with which our Association is most familiar and which, therefore, provide us with the clearest support for our suggested view of what should define federal financial assistance. However, hospitals are far from the only providers of services potentially so affected. As we have mentioned, owners and managers of rental residential properties, owners and operators of supermarkets and grocery stores, and drug store owners and pharmacists are also similarly situated. If the governmentally based payments that any of them receives are deemed to constitute federal financial assistance, they will be subject to costly and disruptive administrative burdens, site visits, compliance reviews, and investigations and, often, litigation. Appropriate definitional revision of S.557 could help to avoid that end.*/

CONCLUSION

The matter of greatest importance to AHA is the provision by its member hospitals of needed medical services to the communities they serve. Clearly, the containment of the cost of such services is an issue of current and vital concern to the Congress and to all Americans as well as to hospitals. AHA thinks it incontrovertible that the passage and implementation of even the most well-intended civil rights legislation should not compound the delivery or receipt of service designed to assure maintenance or restoration of a most fundamental human need--health care. For these reasons, AHA has urged a number of ways in which S.557 can be made less intrusive and less confusing.

AHA's suggestions center upon the revision of three definitional clusters within the bill: 1) questions concerning how far the definition of "program or activity" should be stretched, especially regarding an entity "principally engaged in" certain businesses; 2) the type and breadth of enforcement sanctions; and 3) the creation of a reasonable definition of "federal financial assistance" that would allow for the effective provision of needed public services. AHA believes that appropriate revisions can be accomplished and the purposes of Congress achieved, and will aid in providing whatever ongoing assistance the Committee would desire.

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*/ It has been suggested that the terms of the legislation, in the context of existing regulations, could be deemed to prohibit any hospital from refusing to provide abortion services for other than religious reasons. Although "abortion neutrality" language has been proposed to address this narrow issue, the issue itself illustrates the nature of interpretative problems that the bill creates. Other medical services (beyond abortion) can be found to have selective benefits to different classes of patients. These uncertainties will not be rectified by an abortion-neutrality amendment.

Senator **Mikulski**. This is the conclusion of our hearings on S. 557. This panel is concluded as is this hearing, and we will leave the record open for a seven-day period.

Thank you very much for everyone's most thoughtful participation.

[Whereupon, at 12:50 p.m., the Committee was adjourned.]

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